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NO.

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IN THE SUPREME COURT
OF THE UNITED STATES

(October Term 1987)

*

BARRY KRUPKIN, ET AL.,
Petitioners,

v.

DOW CHEMICAL CO., ET AL.,
Respondents.

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

(Re: Certification of Class
and Class Settlement)

*

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804

QUESTIONS PRESENTED FOR REVIEW

I.

There is a critical and long overdue need - and this is the appropriate case in which to do so - to resolve the abundant conflicts among the circuit courts and decide the nationally important issue of the feasibility of Rule 23 class actions in mass accident and chemical exposure cases involving serious personal injuries and deaths, the procedures that should be followed with regard to the settlement of such cases and the proper criteria which should be utilized in determining whether proposed settlements in such cases are fair, adequate and reasonable.

II.

Whether the district court erred in certifying this case as a Rule 23(b)(3) class over all issues except punitive damages and as a Rule 23(b)(1)

(B) mandatory class with respect to punitive damages.

III.

Assuming *arguendo* that the class action certification was appropriate, whether - in view of the evidence of conflicts of interest; extreme judicial pressure; absence of knowledge about important matters such as the kinds and numbers of claims; absence of participation in the negotiations by the class representatives, veterans leaders and regional counsel; and the overall posture of the case - the settlement in this case was properly negotiated.

IV.

Whether - in view of the paucity of information concerning the kinds and numbers of claims; the absence of a distribution plan or estimate of fees; the timing of the cut-off date for

opting out; and the general posture of the case - the due process rights of the absent class members were violated and/or the district court erred by its failure, before sending out the settlement notices, to conduct a pre-notification process and hearing and to conduct a claims process as part of that procedure; to decide on the distribution plan and probable fees; and to include in the notice of the fairness hearings the kinds and numbers of claims, a summary of the distribution plan, the amount of fees and the options available to the class members, including the right to opt-out of the settlement and class.

V.

Whether - in view of the vigorous opposition of the great majority of the members of the class, including one of the representative plaintiffs and one of

the lead counsel; the fact that there are at least 248,000 claims, of which 128,000 involve serious injuries and deaths, thus making the \$180 million settlement grossly "inadequate" on its face; that the plaintiffs had at least a *prima facie* case on all issues, including causation and the military contractor defense, thus making the settlement "unreasonable" on its face; that the distribution plan totally disfranchised large subgroups of the class, such as independent claims of wives and children and the veterans who suffered serious injury but were not totally disabled; and that the distribution plan was based on non-tort principles, wholly alien to those underlying the lawsuit and the settlement made by the parties - the district court erred in approving the settlement in this case.

PARTIES BELOW

By various estimates, there are over two-hundred and seventy thousand (270,000) members of the class as ultimately certified by the district court below. Of those, it is impossible to determine and include a list of the class members who object to the class certification and settlement.

Only Barry Krupkin has been chosen as the named party since he is typical of those class members who object to the class certification and settlement.

The respondents are: Dow Chemical Company; Thompson Chemical Company; Diamond Shamrock Company; Monsanto Company; T & H Agriculture and Nutrition Company; Hercules Company; and Uniroyal Company.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioners, members of the Agent Orange class who object to the class action certification and settlement, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 21, 1987.

OPINIONS BELOW

1. The order and opinion of the district court, dated December 16, 1983, certifying a Rule 23(b)(3) class action on all claims except for punitive damages and a Rule 23(b)(1)(B) mandatory class on punitive damages. In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (EDNY 1983) (See Vol. I, p. 456a of Single Appendix filed in connection with Petition for Writ of Certiorari submitted by Wayne Michael

Mansulla in *Vincent C. Lombardi, et. al., vs. Dow Chemical Co. et al.*; said Single Appendix shall hereafter be referred to as the "Lombardi Appendix").^{A-1}

2. The order of the district court dispatching notice of the proposed settlement and schedule of fairness hearings dated September 25, 1984. 597 F.Supp. 740, 866-876 (E.D.N.Y.1984). (Vol. I, p. 409a-430a, Lombardi Appendix).

3. The order and opinion of the district court approving the settlement dated September 25, 1984. 597 F.Supp. 740 (E.D.N.Y. 1984) (Vol. I, p. 135a of Lombardi Appendix).

A-1. Mr. Mansulla has expressly authorized the Petitioners in this Petition to cite and utilize the Single Appendix he has filed in *Lombardi*. Some of the relevant decisions are not contained in the *Lombardi* Appendix. Those are included in the separate Appendix to this Petition.

4. The order and opinion of the district court establishing a plan of distribution for the settlement fund, and final judgment, dated May 28, 1985. 611 F.Supp. 1396 (E.D.N.Y. 1985) (Appendix I to this Petition).

5. The opinion and judgment of the Court of Appeals affirming the certification of the class, the settlement notice and procedures and the settlement. In Re "Agent Orange" Product Liability Litigation, MDL No. 381, 818 F.2d 145 (2 Cir. 1987). (Vol. II, p. 676a of Lombardi Appendix).

6. The opinion and judgment of the Court of Appeals affirming the distribution plan in part and reversing in part. 813 F.2d 179. (Appendix II to this Petition).

7. The Order of the Court of Appeals overruling Plaintiffs' Motion for Rehearing. (Vol. II, p. 777a of Lombardi Appendix).

JURISDICTION

The final judgment of the Court of Appeals was entered on April 21, 1987. A petition for rehearing and rehearing en banc was timely filed and it was overruled on June 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of Rule 23 F.R.C.P., the class action rule. It also involves the 5th and 14th Amendments to the U.S. Constitution (due process clauses).

STATEMENT OF THE CASE

Veterans who served in Vietnam during the Vietnam War and their families filed a class action suit against seven chemical companies alleging that they formulated, manufactured and sold to the U. S. Government a

herbicide called Agent Orange and that the servicepersons suffered serious injuries or deaths, their wives suffered miscarriages and their children birth defects as a result of the servicepersons' exposure to the Agent Orange in Vietnam. The herbicide was used to defoliate the jungle and destroy the enemy's food crops. The plaintiffs' cause of action was based upon simple and gross negligence, product defects and intentional torts. Agent Orange is a combination of two products the chemical companies had, for some time previously, been selling domestically as herbicides, namely dichlorophenoxyacetic acid (2,4-D) and trichlorophenoxyacetic acid (2,4,5-T). As a part of the manufacturing of 2,4,5-T, a contaminant is created. It is called tetrachlorodibenzo-para-dioxin or 2,3,7,8-TCDD ("dioxin"). Dioxin is one of the most toxic compounds known to man and is at the

heart of the Agent Orange litigation. Plaintiffs alleged that exposure¹ to dioxin causes cancers, liver diseases, neurological problems, chloracne and other skin problems, birth defects in the exposed person's children, and other serious maladies.

1. Initial Rulings On Military Contractor Defense. Early on, Judge Pratt, the initial judge in the district court, established three elements for the military contractor defense, 506 F.Supp. 762 (EDNY1980);² stated he would con-

1. In testimony before the Subcommittee on Oversight and Investigation on November 19, 1982, the EPA took the position that there is no safe level of exposure to dioxin. EPA has concluded: "In sum, the data on toxic effects in animals and humans together with the data on exposure potential establish that the continued use of 2,4,5-T and silvex contaminated with TCDD (dioxin) pose risks of adverse affects on human health". Doc. 5400, Exhibit 4, JA 13434.

2. Element One is that "the government established the specifications for the product" and element two is that the chemical companies manufactured the product in conformity with those specifica-

duct serial trials; and hold the initial trial on that issue only. *Id.* Thereafter, five of the seven chemical company defendants filed motions for summary judgment on on the basis of the military contractor defense; three (Dow, T & H, and Uniroyal) were granted partial summary judgments on elements one and two, but denied complete summary judgments because of the existence of fact issues on element three; and Hercules and Thompson Chemical were granted complete summary judgments. (Monsanto and Diamond Shamrock are the two that did not file such motions.)³

tions. Element three is that the Government knew as much about the hazards of the product as the manufacturer.

3. It may not be just coincidental that Monsanto and Diamond Shamrock had the highest amounts of dioxin in their products. See *Agent Orange on Trial, Mass Toxic Disasters in the Courts*, Peter H. Schuck, The Belknap Press of Harvard University Press, 1986 (hereafter "Schuck"), at 141.

2. Judge Weinstein takes over case.

In September of 1983, Judge Pratt, having been appointed to the Second Circuit, transferred the case to Judge Weinstein and its posture changed dramatically. Judge Weinstein immediately reinstated Thompson Chemical and Hercules as defendants and the United States Government as a third-party defendant;* and ordered that, instead of the serial trials that Judge Pratt had planned, he would try approximately ten test cases on *all* issues, including liability, causation, actual damages and punitive damages. See Schuck pp. 111-117. He set the test cases for trial on the merits for May 7, 1984. Up to September 1983, because the only trial scheduled had been on the military

4. The chemical companies had sued the U.S. as a third-party defendant for indemnity and Judge Pratt had granted the U.S. an interlocutory default judgment, on the basis of the *Feres* doctrine. 506 F.Supp. 762 (1980).

contractor defense, not involving medical causation in any way, no clinical or epidemiological studies⁵ were undertaken by plaintiffs and after September, 1983, time pressures forced the plaintiffs to concentrate their medical causation efforts solely upon the ten cases going to trial. Judge Weinstein also certified a Rule 23(b)(3) class action as to all issues except punitive damages and a Rule 23(b)(1)(B) mandatory class with regard to punitive damages. 100 FRD 713, 724.* He further

5. The costs of undertaking clinical studies on each plaintiff was so substantial that it made no sense to commence such studies until they became necessary for trial. The cost of an epidemiological study was prohibitive - over \$20 million. As discussed, *infra*, Judge Weinstein's narrow causation doctrine (requiring epidemiological studies) would thus "price out" toxic tort plaintiffs.

6. Judge Weinstein defined the plaintiff class as: "Those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or

required the issuance of notice⁷ which provided for a cut-off date of May 1, 1984 for opting-out of the Rule 23(b)(3) class.

3. Motions concerning military contractor defense. Extremely pertinent to the discussion, *infra*, of the military contractor defense is the fact that before the May 7, 1984 trial, plaintiffs filed a motion to reconsider Judge Pratt's previous partial summary

other phenoxy herbicides, including those composed in whole or in part of 2,4,5-T, trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure." *Id.* at 729.

7. The adequacy of notice to the class and questions touching upon subject matter and in personam jurisdiction are not addressed in this Petition. They are addressed, however, in a Petition being filed by Wayne Mansulla and Prof. Sherman Cohen. See Petition for Certiorari styled *Pinkney v. Dow*.

judgment on elements one and two of that defense. Doc. 862, J.A., mentioned at 597 F.Supp. 843, 847-8. See excerpts of such motion in Appendix III. The motion, based on deposition testimony and documents, demonstrated clearly that fact issues existed with respect to those two elements; that Agent Orange was the combination of two off-the-shelf products previously formulated, manufactured and sold domestically; that the specifications approved by the Government did not mention or authorize the presence of dioxin; and since it was undisputed that such deadly contaminant was present in *all* Agent Orange, the chemical companies did not, therefore, manufacture Agent Orange in conformity with the specifications.® Judge

8. Undersigned counsel, who took over the handling of the military contractor defense issue from Yannacone & Assoc. in October of 1983, filed a number of other motions concerning that issue, including a motion to allow VIP witnesses (persons high up in the Kennedy, Johnson and Nixon

Weinstein agreed to permit the introduction of evidence on elements one and two at the trial of the case. See Excerpts of Trans. of Hearing, Mar. 19, 1984, included in Appendix III.

4. Agent Orange Plaintiffs Management Committee ("AOPMC") fee-sharing agreement. When Yannacone & Associates resigned in September of 1983 as class counsel, the court appointed the undersigned counsel and two others to form a new AOPMC. In order to secure the monies required to finance the litigation, it became necessary to give six of the nine members of the new AOPMC, who were providing the general monthly operating funds for the litigation, a three-to-one return on their money. The agreement to

Administrations), who had not yet been deposed, to testify that, as persons who participated in the decision-making process, they had no knowledge of dioxin or that Agent Orange could be hazardous to human health.

do this significantly influenced the settlement negotiations. See discussion, *infra*. Judge Weinstein, though critical of the agreement, refused to order it rescinded. 611 F.Supp. 1452.

5. Tentative settlement agreement reached May 7, 1984. Judge Weinstein, just after the opt-out period had expired, and on the weekend just before trial was to begin, ordered all counsel to "bring their toothbrushes" and appear before him and three special masters (appointed to assist in settlement discussions) for the purpose of conducting round-the-clock settlement negotiations. Doc. 5600, J.A.; Schuck at p. 150. In the early morning hours of May 7, the day the ten test cases were going to trial, a tentative settlement was reached between the AOPMC and the seven chemical company defendants. The tentative agreement was simple - it provided for the immediate payment of

\$180 million lump sum for all claims, including those of non-totally disabled veterans and the independent claims of wives and children. See 597 F.Supp. at 862-866. This was not a settlement negotiated by the parties - it was an agreement forged by Judge Weinstein's aggressive, take-it-or-leave-it attitude, under a trying and highly unfavorable negotiating environment, and in an almost total vacuum of knowledge about the kinds and numbers of claims.

The undersigned counsel, then a member of the AOPMC, filed a sworn, question-and-answer affidavit which was never contradicted by any member of the AOPMC or anyone else. Doc. 5600, JA 14792. Moreover, after exhaustive research and interviews, including conversations with other members of the AOPMC, Prof. Schuck corroborated the essential contents of such affidavit. Schuck, pp. 143-166. See also Manes/

Ellison Affidavits, J. A. 17256
Yannacone Depo. Affidavit, Doc. 5522,
J.A. 14458-60; and Doc. 5121. As Prof.
Schuck observed "[f]rom the moment
Weinstein entered the Agent Orange case,
the goal of settlement was uppermost in
his mind" because "he believed that a
mass toxic tort ... case like Agent
Orange should not be litigated". id. p.
143.

Judge Weinstein selected \$180, as the
settlement figure and in effect told the
parties that the case *would be settled
for that amount.* id. Doc. 5600; Schuck,
p. 159. Indeed, even though Special
Master Shapiro reported to Judge
Weinstein that he could get the chemical
companies to pay \$200 million, "the
judge adamantly refused", stating that
\$180 million was the amount the case
would be settled for because "he did not
want the settlement amount to . . .
(encourage) groundless mass toxic tort

litigation in the future." Schuck at 159, 163.^{8A} Judge Weinstein excluded the class representatives, referring counsel and veterans organization officials from the negotiations completely and all but two of the ADPMC until the last weekend of the negotiations. id., Doc. 5600.

The combination of time pressure and weariness impaired the ability of the ADPMC to withstand Judge Weinstein's intensive push. id. Doc. 5600. The last day of the negotiations, as the ADPMC resisted, Judge Weinstein not-so-vaguely threatened to change rulings he had previously made which were favorable to plaintiffs and to hold the ADPMC

8A. The intent of Judge Weinstein to chill toxic tort litigation was further manifested during the negotiations by his agreeing with the defendants that the settlement agreement should state that "causation had not been proved" and to consider low fees to class counsel "in order to discourage such (toxic tort) suits in the future." Schuck at 154, 164.

"personally responsible" should they not agree to the \$180 million." *id.* Doc. 5600; Schuck at 163. He also used the carrot as well as the stick; he strongly implied that, if the settlement were accepted, plaintiffs would have their day in Court against the Government,¹⁰ the wives and children would

9. One member of the AOPMC, O'Quinn, who finally changed his vote to approve the settlement, stated he changed his vote primarily because he construed this statement to mean that the members of the AOPMC would personally have to pay the \$180 million if they refused the settlement and lost the case. Doc. 5600, *Schuck, id.* at 163.

10. Judge Weinstein had suggested that plaintiffs expressly retain, in the settlement agreement, the right to pursue the Government, which the plaintiffs did. Doc. 2750. He implied that he would stand by the rationale expressed in his opinion bringing the Government back into the litigation with respect to the chemical companies' third-party complaint. See 580 F.Supp. 1242. As stated, the AOPMC relied upon the action against the Government as another possible source of damages for the class. See Doc. 5600, JA 14882-14885; Doc. 2897, JA 6685-6703.

be compensated and the funds would be distributed on a tort concept (cause and effect) basis. *id.* Doc. 5600. ^{10A} In addition to all the foregoing, Judge Weinstein took advantage of the knowledge vacuum about the numbers and kinds of claims; the AOPMC accepted Stanley Chesley's estimate that there were only 20,000 claims, of which only 3,000 were serious in nature. *id.* Doc. 5600; Schuck at p. 162. ^{10B}

With the six members of the AOPMC who were receiving the three-to-one return on their monetary advances all voting in the affirmative, the AOPMC finally agreed to Judge Weinstein's \$180 million

10A. As discussed, *infra*, none of these implied commitments were fulfilled.

10B. The estimate of Mr. Chesley, one of the financial members of the AOPMC, was grossly incorrect; a claims process completed in May of 1985 established the total number of claims at 248,000, with 128,000 serious in nature (cancers, deaths, birth defects, etc.). Doc. 60460, J.A. 15519; 611 F.Supp. at 1417.

settlement figure. id. Doc. 5600. Schuck at pp. 162-165. Not a single one of the ADPMC agreed to the settlement because he thought plaintiffs could not win the scheduled jury trial - they *all* thought that the plaintiffs would establish a strong *prima facie* case on all issues.¹¹ Prof. Schuck sensed what really happened with regard to the negotiations in this case:

In such a situation, the dangers of judicial overreaching and intimidation in quest of settlement are no less real for being subtle. A well-meaning, but overzealous judge may occasionally go too far

11. See undersigned counsel's statement in Doc. 5600; David Dean's statement at the first fairness hearing, Doc. 3565, p. 10 ("... the defendants acts were so egregious and the plight of the innocent veterans so evident ... that I believe we would have won"); Tom Henderson's statement that "I believe the case would have been won in the most conservative jurisdiction in the United States, let alone before a Brooklyn jury", N.Y. Times, May 8, 1984; and the statement of Gene Locks that plaintiffs would have won. Doc. 4389, p. 409, JA 11105.

and "coerce" settlement, and Weinstein himself has been accused of this. (Citing *Kothe v. Smith*, 771 F.2d 667 (2 Cir. 1985) and the *Almanac of Federal Judiciary* (Chicago: Law Letters, Winter 1984), at 57).

Schuck at p. 163.

6. Post-settlement events. Soon after the tentative settlement agreement was reached, the undersigned counsel requested Judge Weinstein, through the Special Master, to in effect conduct a pre-notification process and hearing, including a claims process and adopt a distribution plan *before* conducting the fairness hearings or deciding whether to approve the settlement. Doc. 5600, *id.* Judge Weinstein rejected these suggestions and set and held the fairness hearings in August of 1984, 597 F.Supp. 740, while not completing the claims process until May of 1985, 611 F.Supp. at 1401, Doc. 6046, J.A. 15519; not deciding on the fees until January of

1985, see Jan. 7, 1985 order, JA 11776; and not adopting a distribution plan until May of 1985, 611 F.Supp. 1396.¹² Therefore, the notice of the settlement and *fairness hearings did not* contain any information about the numbers and kinds of claims, the distrubution plan or the fees and none of this information was available during the fairness

12. Indeed, as Shuck reports, the delay in adopting a distribution plan until *after* the settlement notice and fairness hearings was *intended* to keep the veterans less informed and thus reduce any further alarm among them. "Until the distribution plan was revealed, the settlement would be little more than a pig in a poke." *Schuck* at 172, 173. Shuck, referring to the comments of Special Master Shapiro, further stated: "While it is conceivable that elements of a skeletal plan could be articulated with safety, in this case particularly 'less is more.'" *Id.*

hearings. 597 F.Supp. at 866-876.¹³

Moreover, the court was urged to allow another opt-out period so that the plaintiffs could opt-out of the class settlement after all such information became available and to allow discovery with regard to the settlement negotiations and possible conflicts of interest. Rule 59 Motions, Doc. 4919, 4939, 5121, 5353 and 5476. Judge Weinstein arbitrarily refused these requests. See Trans. Feb. 6, 1985 Hearing, pp. 181-183 and entire record.

7. Approval of the settlement and

13. Typical of the Veterans' reactions at the fairness hearings, was this comment of one: "Number one, how can the court request class members to decide if the settlement is fair and reasonable when the proposed settlement does not provide those affected with adequate information on which to make an intelligent decision?" 597 F.Supp. at 711.

plan of distribution. Judge Weinstein, in his lengthy opinion approving the settlement, 597 F.Supp. 740, made it clear that, at the least, fact issues existed with respect to the military contractor defense. 597 F.Supp. at 797, 799, 847-851.¹⁴ He in effect conceded that the lump sum amount was grossly inadequate when compared to the numbers and kinds of claims. 597 F. Supp. at 762.¹⁵ He further

14. At p. 797 of 597 F.Supp., Judge Weinstein stated that the military contractor defense issue "almost certainly would have been ... submitted to a jury."

15. One of the class representatives, Ms Ryan, testified that "now I realize we are in need of a miracle of the loaves and the fishes if we only have 180 million". 597 F.Supp. at 767. Victor Yannacone, who initiated the suit, stated that the settlement was so inadequate that it is "morally unconscionable and has to reflect one of the saddest days of the Trial Bar in personal injury litigation". Doc. 6101, J.A. 16425-16430. The Court of Appeals put it this way: "If even a small number of plaintiffs had gone on to prevail at trial, however, the actual exposure of the chemical companies might well have

admitted that "only a small fraction of one percent of the class" had been heard from at the fairness hearings and it is undisputed that the overwhelming majority of the class is opposed to the settlement.¹⁶ The way Judge Weinstein

been measured instead in the billions of dollars. Jury verdicts of several million dollars for disabling ailments or injuries to children are not uncommon. If, in the present litigation, each serious claim had a settlement value of \$500,000, the \$180 million would at best cover only 360 plaintiffs. Indeed, the \$180 million is at best only a small multiple of, at worst less than, the fees the chemical companies would have had to pay their lawyers had they continued the litigation. However large a sum \$180 million may be, therefore, we must conclude that in the circumstances it was essentially a settlement at nuisance value." 818 F.2d at 171.

16. Todd Ensign, executive director of Citizen Soldier, estimated under oath that over 90% of the veterans are opposed to the settlement. Doc. 5476, JA 17252, et seq. See also affidavits of Manes and Ellison, local referring attorneys who represent a large number of individual plaintiffs, JA 17256. These estimates were not disputed.

concluded that the settlement was "reasonable", despite the fact it was grossly inadequate on its face, was the clearly erroneous view that plaintiffs could not prove medical causation as to any of 248,000 claims. 597 F.Supp. at 782-795 and see 611 F.Supp. 1223 (opinion on the opt-outs).

The distribution plan adopted by Judge Weinstein demonstrates better than our words ever could the gross inadequacy of the settlement. 611 F.Supp. 1396. Dependent survivors of Vietnam veterans who served their country only to die at home from exposure to Agent Orange will receive a ~~maximum~~ of \$3,400. Totally disabled veterans will receive a ~~maximum~~ of \$12,800. Veterans who are horribly ill but who are not totally disabled within the stringent definition of that term in the Social Security Act and wives who

suffered miscarriages and children with heart-wrenching birth defects as a result of the veterans' exposure to Agent Orange *will all receive nothing*. Most disturbing is that Judge Weinstein completely disregarded the tort concepts which lay at the foundation of the class action and the intent of the AOPMC in agreeing to the tentative settlement, such intent being reflected by the AOPMC's proposed distribution plan (based on cause and effect; discussed 611 F.Supp. at p. 1407-1410 and 813 F.2d at 182, 184).^{16A}

Lastly, Judge Weinstein completed the world's greatest judicial finesse; he changed his views and dismissed the Vietnam Veterans' direct case against

16A. In addition, Judge Weinstein allocated 25 per cent of the settlement fund to a "class assistance foundation" which would be given "broad mandates" to "deal with their (the class') medical and related problems." 611 F.Supp. at 1432.

the Government. 603 F.Supp. 239.
(Compare with 580 F.Supp. 1242).

8. The rulings of the Court of Appeals. The Court of Appeals - though expressing serious "skepticism over the usefulness of class actions in so-called mass tort cases and, in particular, claims for injuries resulting from toxic exposure", 813 F.2d at 164; rejecting the view that generic causation might be an appropriate issue for a class action trial, 813 F.2d at 164, 165; and concluding that "[w]here this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error", 813 F.2d at 166 - nevertheless affirmed the certification on the erroneous theory that Rule 23(b)(3) "class certification was justified ... due to the centrality of the military contractor defense", id. at

166, and that such defense was "common to all of the plaintiffs' cases", *id.* at 166, 167. Furthermore, with disturbing detachment, the Court of Appeals approved the settlement negotiations and procedures and converted a "nuisance value" settlement into a theoretically "reasonable" settlement by holding that the military contractor defense conclusively barred all Agent Orange claims of the plaintiffs. 813 F.2d at 173, 174, and opt-out opinion 813 F.2d 187.¹⁷

The Court of Appeals adopted a novel and completely unprecedented approach to that defense by extrapolating medical causation into it and holding that the chemical companies had no duty to impart to the Government knowledge of hazards which were "speculative". 813 F.2d at

17. The opt-outs are the subject of still another, separate petition for writ of certiorari being filed by Wayne Mansulla. See petition styled *Lombardi v. Dow Chemical Co., et al.*

173, 174. But the absence of causation "as to any claim" in this case is a myth. Not only was it impossible for Judge Weinstein or the Court of Appeals to make any assessment as to the 247,990 claims on which no clinical analysis had been made or discovery engaged in, but the evidence overwhelmingly established fact issues on medical causation with respect to the ten cases going to trial. The multiple markers, clinical studies, relevant biostatistical data, evaluations of existing epidemiological studies,^{17A} strong evidence of exposure and the opinion testimony of over 14 world-class experts - including clini-

17A. A new mortality study just released by the V.A. indicates that a statistically significant higher number of deaths from cancers, including cancer of the lymphatic systems- which one of the representative plaintiffs in this case, David Lambiotte, had - has occurred in Marines who served in Vietnam and were exposed to Agent Orange. See New York Times, September, 1987.

cians, oncologists, epidemiologists, geneticists, urologists, toxicologists, dermatologists, internists and biostatisticians - more than established *prima facie* cases with respect to those ten plaintiffs.¹⁸ For further detail of some of the causation evidence, see Appendix IV. Moreover, a number of fact issues existed with regard to all elements of the military contractor defense. See Appendix III for a further detailing of some of the evidence on the military contractor defense.^{18A}

18. Even Judge Weinstein conceded that: "Yet, despite the lack of general scientific evidence, it cannot be said without hearing the evidence that the plaintiffs could not possibly recover." 597 F.Supp. at 786.

18A. What is further perplexing, is that the Court of Appeals approved the settlement despite the fact that it held that the fee-sharing agreement created a troubling conflict of interest, 813 F.2d 216, and that Judge Weinstein's "class assistance formulations" had to be struck down. 813 F.2d 179.

REASONS FOR GRANTING
PETITION FOR WRIT OF CERTIORARI

I.

PRELIMINARY STATEMENT

In this historic case, the district court, and now the Court of Appeals, have presented the world of law with a morally unacceptable legal disposition. They have said that it is their opinion that the Vietnam veterans are legally entitled to nothing out of their suit against the chemical companies but yet it is permissible to extract from those same companies \$180 million for a debt they do not owe. The Vietnam veterans agree with the New York Times - this "Orangemail" should not be legally or morally tolerated. To the credit of the Vietnam veterans, if indeed they are truly entitled to *nothing* out of their lawsuit, they would rather have *nothing* than have the few thousand dollars that

less than five percent of the claimants are going to be "handed-out", with the tragic footnote that the same system which they obeyed when they accepted their draft notices and went off to fight a war nobody wanted or cared about, is now going to close the courthouse door in their face, lock it tight and throw away the key.

All the Vietnam veterans have ever wanted is an adequate settlement or their day in court. The Court of Appeals conceded that the settlement it affirmed was nothing more than one of "nuisance value", 818 F.2d at p. 151, and has justified it as being "reasonable" solely on the ground that the military contractor defense bars as a matter of law all of the claims of the class. This astounding holding was reached through a short shrift analysis of this case that completely ignored the first

two elements of that defense, utilized a new and unprecedented modification of its criteria and made no attempt to analyze the evidence with regard to the issue of comparative knowledge.

In one sweep of the judicial broom, the Vietnam veterans have been reduced to subclass citizens and stripped of their sacred right to a trial by jury, all of this occurring without even a pretense of affording them the minimum protection of Rule 56, F.R.C.P. With all due respect, this judicial catastrophe has to some extent been made possible by an absence of Supreme Court guidance in the areas of law relevant to this unprecedented case. As a result of this, the courts of appeals and district courts have charted their own differing courses into the unknown, with consequential severe conflicts among the circuit courts, confusion,

lack of uniformity and the opportunity for nationally significant cases such as this one to go awry.

This Court has apparently recognized the need to now address questions involving the military contractor defense, by granting writ of certiorari in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4 Cir. 1986), cert granted, 107 S.Ct. 872 and *Shaw v. Aerospace Corp.*, 778 F.2d 736 (11 Cir. 1985), cert. granted, 106 S.Ct. 2243. In view of the prominent role the military contractor defense has played in this case, it is hoped that the Court will at least grant writ of certiorari on that issue and it is our sincere view that the Court would do well, in view of the need for Supreme Court mandates on the other issues and the importance of this case to our nation as a whole, to grant writ of certiorari on all issues herein

discussed.

II.

Certiorari Should Be Granted To Clarify Whether Cases Such As Agent Orange Are Appropriate For Class Action Disposition.

Quoting the Comment to Rule 23(b) (3),¹⁸⁸ the Court of Appeals, 818 F.2d at 164, properly expressed extreme doubt about the propriety of a class action in a case of this type, citing *In re Northern Dist. of Cal. Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847 (9 Cir. 1982), *cert denied*, 459 U.S. 1171 (1980); *Payton v. Abbott Labs*, 100 F.R.D. 336 (D.Mass. 1983); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566 (E.D.Tex

188. The Advisory Committee Note to the 1966 Revision of Rule 23(b)(3) states: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.").

(1974); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 83-85 (M.D.Pa.), appeal dismissed, 505 F.2d 729 (3 Cir. 1974). But the Court of Appeals failed to heed its own admonitions and seized upon the military contractor defense as the ultimate solution for the ultimate case. Where the Court of Appeals went astray was in its misperception that the military contractor defense "is governed by federal law"¹⁹ and "is common to all of the plaintiffs' cases." 818 F.2d at 166, 167. The Court of Appeals was patently wrong in assuming that the military contractor defense was common

19. The holding that federal law applies despite the fact that this is a case where jurisdiction is based on diversity of citizenship, is directly contrary to a number of cases. See *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3 Cir. 1982); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 600 (7 Cir. 1985); *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77 (5 Cir. 1975).

to all plaintiffs or to all defendants. It is undisputed that the knowledge of the chemical companies and the Government progressed between 1961 and 1972 not at an equal pace, so that each plaintiff's vulnerability to the "comparative knowledge" element of the military contractor defense would depend upon his or her time of service and/or exposure in Vietnam. Moreover, the knowledge of each defendant chemical company varied and each had differing amounts of dioxin in its Agent Orange, thus making the need to warn of hazards quantitatively and qualitatively different.

Thus, the tenuous reason for just barely affirming the certification of the class given by the Court of Appeals was wholly untenable. There were, in fact, no predominantly common questions

of fact or law in this case and, therefore, the class action device was not "superior to other available methods for the fair and efficient adjudication of the controversy". The MDL vehicle, combined with the test case approach utilized in the asbestos and benedictine litigation, is by far a superior method procedurally for handling this case and would certainly rectify now, and prevent in the future, the grave injustice of individual judicial rights being nullified by a judge bent on using the class action mechanism as a "means" to accomplish the "end" of judicial expediency.

The holding of the Court of Appeals conflicts with *Dalkon Shield* and the other decisions cited above, thus making certiorari intervention by the Court entirely appropriate. Moreover, as we now discuss, the undisputed facts in this case - relating to the settlement

negotiations, the post-settlement procedures and the fairness of the settlement - provide the sharpest examples of all why the drafters of Rule 23 must have been clairvoyant and so wise when they warned that Rule 23 class actions should generally not be used in mass tort cases.

III.

Supreme Court Guidance Is Needed To Proscribe Limits Upon The Use Of Judicial Power, To Clarify To What Degree Conflicts Of Interest Will Be Permitted And Lay Down The Other Basic Rules Which Should Guide Class Action Settlement Negotiations.

As the facts about what took place during negotiations, related in the Statement of Case above, make clear, Judge Weinstein violated one of the most salutary principles of class action settlement negotiations. As the court in *Plummer v. Chemical Bank*, 668 F.2d 654 (2 Cir. 1982), stated, "the district judge (in a class action) should not

take it upon himself to modify the terms of the proposed settlement decree, nor should he participate in any bargaining for better terms"; the most a district judge should do is, "with circumspection, 'edge' the parties in what he considers to be the right direction". 656 F.2d at 655, 656.^{19A}

The conclusion is inescapable that the decision of the Court of Appeals, in failing to strike down the settlement as being the product of the judge and not the parties, is in fatal conflict with the principles enunciated in

19A. See also *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1125 (7 Cir.), cert den. 444 U.S. 870 (1979); *Armstrong v. Board of School Directors*, 471 F.Supp. 800, 804 (ED Wis 1979), aff'd 616 F.2d 305, 315 (7 Cir. 1980); and *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5 Cir. 1978) (stating that the role of a judge in class action settlements "is generally limited to mediating disputes and offering suggestions".) See also *In re Nissan Motor Corporation Antitrust Litigation*, 552 F.2d 1088, 1096 (5 Cir. 1977).

Plummer, In Re General Motors, Pettway and Nissan. That Judge Weinstein transgressed such principles is perhaps best elucidated by Prof. Schuck:

Given these firm commitments to a settlement almost entirely of his own construction, it was inconceivable that Judge Weinstein would fail to find the agreement "fair, reasonable, and adequate." In effect, he was acting as judge in what had come to be his own case insofar as the settlement was concerned. As to that issue, at least, he was plainly interested in the outcome. For this reason alone, he should have left the Rule 23(e) evaluation of the settlement to another, more detached judge.

Schuck at 178, 179.

The judicial overreaching of Judge Weinstein was compounded by the existence of apparent conflicts of interest, e.g. the fee sharing agreement, see 818 F.2d 216, and by Judge Weinstein's recalcitrant refusal to allow discovery with regard to the negotiating process and the possible conflicts of interest. See *In Re General Motors, supra*, (holding

that failure to permit discovery under circumstances similar to those in this case was an abuse of discretion, 594 F.2d at 1124, 1126); *Girsch v. Jepson*, 521 F.2d 153, 157, 158 (3 Cir. 1975); *Manual for Complex Litigation*, Sec. 146 at 53-54. Moreover, another alarm bell should have been heard by the Court of Appeals by the manner in which private and referring counsel, veteran leaders and class representatives were totally excluded from the negotiations and seven of the class counsel were excluded until the last weekend of the negotiations. See *In re General Motors*, 594 F.2d at 1124-1128. —

Lastly, at the very heart of the impropriety of negotiations in this case was the blatant insufficiency of knowledge about the numbers and kinds of claims. The court in *In re Chicken Anti-trust Litigation*, 669 F.2d 228, 241 (5

Cir. 1982) mandated that "if the record shows unmistakably that the settlement was the product of uneducated guess-work", it should be disapproved "without ever considering whether the agreement is fair."¹⁷ Because of this vacuum of knowledge, the AOPMC was easily misled by inaccurate information about the numbers and kinds of claims. When the other misguided assumptions of the AOPMC - that the class would be given its day in court against the Government; that wives and children would receive direct compensation; and that all funds would be distributed pursuant to traditional

19B. See also *In re Traffic Executive Railroad Assn E. Railroads*, 627 F.2d 631, 633 (2 Cir. 1980) (it is necessary for the judge and the parties "to explore the facts sufficiently to make an intelligent comparison between the amount of the compromise and the probable recovery"); *Plummer*, 668 F.2d at 660 (must know amount of claims so judge will know "what the (class) members are giving up"); and *Malchman v. Davis*, 706 F.2d at 433.

tort principles - are added to the equation, it becomes clear that equitable principles of rescission based upon "mistake" should have been given effect, thus obviating the need to conduct fairness hearings on the settlement.

IV.

Another Area That Calls For Enlightenment By The Supreme Court Involves The Post-Settlement Procedures Dealing With The Final Approval Of A Class Action Settlement.

We have in this case a class that should have never been certified and a tentative settlement that should have never been reached. In this situation, the district court should have, at the least, been ever more vigilant in connection with the post-settlement procedures to ensure that the rights of all members of the class were fully protected. We are reminded of one principle that has no peer in class-

action litigation and that is that the district court must act as "guardian" of absentee class members and that "convenience and expediency cannot justify the disregard of the individual rights of even a fraction of the class." *In Re General Motors*, 594 F.2d at 1133; *Greenfield v. Villager Industries*, 483 F.2d 824, 832 (3 Cir. 1973); and *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8 Cir.1975).

Because of what has happened in this case, the need to grant certiorari and adopt the following minimum protections of the "individual rights" of class members emerges: (1) that, in cases where a lump sum settlement has been offered in a class action with a large number of claims involving deaths and varying types of serious personal injuries, a pre-notification process must be undertaken, which includes a

preliminary claims analysis to determine the numbers and kinds of claims, the development of a distribution plan and a reasonable effort to estimate the fees and charges against the settlement fund; (2) upon completion of that process, a pre-notification hearing must be conducted in such cases, to determine whether the offer is "within the range" of adequacy and reasonableness, and, if it is, then, and only then, would the court proceed to notice the class of the fairness hearings; (3) the notice of the fairness hearings in such cases must contain an abbreviated but accurate statement of the numbers and kinds of claims, the basic terms of the distribution plan, the estimated fees and charges against the settlement fund and a reasonable explanation of what the settlement really means to those in each category of maladies; and (4) most

important, the notice of the fairness hearings must include an explanation of the options available to the class members and those options must at least include the option of *opting-out of the class and the settlement.*

The court of appeals' decisions which discuss these procedural absolutes are fuzzy, inconsistent and frequently in diametrical conflict. This is all the more reason for this Court to enter the arena. For example, a number of cases indicate that the pre-notification process and hearing is the better part of wisdom - *In Re General Motors*, 594 F.2d 1124-1126; *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7 Cir.1980); and *Manual of Complex Litigation*, Sec. 1.46, at 53-55 (West 1977) - while others pay only lip-service to the suggestion. *In Re Agent Orange*, 818 F.2d at 169, 170, and *City of Detroit v.*

Grinnell Corp., 495 F.2d 448, 462-3 (2 Cir. 1974) ("*Grinnell I*").

The court of appeals' decisions with respect to the contents of the settlement notices are even more disparate and murky. This Court set the proper tone in two decisions, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949) and *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985). In *Mullane*, the Court established that notices such as a class-action settlement notice are subject to the due process clause and must be "of such nature as reasonably to convey the required information." 339 U.S. at 314, 315. But what is the "required information"? We respectfully suggest that the lower courts need narrower guidelines. For example, we vainly begged the district court to complete a claims process, promulgate a proposed distribution plan and include

such information, together with the right to opt-out, in the notice of the fairness hearings. This procedure seems supported by the "model case" of *State of W. Va. v. Charles Pfizer & Co.*, 440 F.2d 107 (2 Cir. 1971), cert den. 404 U.S. 871. More explicitly, the court in *Greenfield* stated:

Moreover, the purpose of the notices (settlement notice) was to afford a three-fold opportunity to absentee class members: (1) to file a claim; (2) *to state a desire for exclusion*; or (3) to object to the settlement. *Each of these alternatives is important.*"

483 F.2d at 833; emphasis ours. See also *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1156, 1182 (5 Cir. 1978) and *Ace Heating and Plumbing Co. v. Crane Co.*, 453 F.2d 30, 33 (3 Cir. 1971).

The Court of Appeals ignored the opt-out-of-the-settlement issue, as it did so many others. 818 F.2d at 169, 170. We do not say that information as

to the numbers and kinds of claims, the terms of the distribution plan and the opportunity to opt out of the settlement must be included in the settlement notice in every class action situation. Obviously more flexibility is needed in large, consumer-type class actions where the claims are numerous but small in size and are generally generic. But we do respectfully suggest that the Court should grant certiorari in this case, if for no other reason but to make it clear that, if a district court does enter what should nearly always be forbidden territory - the mass tort class action - the least it should do, consistent with due process and in order to avert the enormous injustices which have occurred in this case, is to ascertain the numbers and kinds of claims, tell the tort claimant how those numbers affect his or her claim within the context of

the distribution plan being adopted and then give each claimant -at that point- the opportunity not only to oppose the settlement but to opt out of a situation which otherwise "gives them no option at all".

V.

Supreme Court Clarification Is Also Needed With Regard to the Approval of Settlements in Mass Tort Class Actions, Particularly Where the Great Majority of the Class Opposes the Settlement; Where The Amount of the Settlement Is Grossly Inadequate On Its Face and There Is A *Prima Facie* Case As To Liability; And Where The Distribution Plan Constitutes A Unilateral "Alteration" Of The Settlement Reached By the Parties.

A. Class Opposition. The vehement opposition to the settlement by a great majority of the class was not seen as a problem by Judge Weinstein or the Court of Appeals,²⁰ but their attitude in that

20. Judge Weinstein, after admitting that he only heard from a fraction of 1% of the class at the fairness hearings, found the "overwhelmingly large silent majority inscrutable." 597 F.Supp. at

regard appears to be contrary to a number of other decisions. *TBK Partners Ltd v. Western Union Corp.*, 675 F.2d 456 (2 Cir.1982); *Pettway*, 576 F.2d 1157, 1216-17 (disapproving settlement opposed by 70% of subclass); *In re General Motors*, 594 F.2d at 1137; *Ace Heating and Plumbing*, *supra*; *Flinn v. FMC Corp.*, 528 F.2d 1169 (7 Cir. 1971); and *Plummer*, *supra*. As the court in *TBK*

761. As the Court in *In re General Motors* stated: "[W]e are not as willing as GM to infer support from silence.... [I]t (the Court) should be reluctant to rely heavily on the lack of opposition by alleged class members. Such parties typically do not have the time, money or knowledge to safeguard their interests by presenting the evidence or advancing arguments objecting to the settlement. ... Acquiescence to a bad deal is something quite different than affirmative support." 594 F.2d at 1137. See also, *In re Traffic Executive Assn.-E. Railroads*, 627 F.2d at 634 and *Van Gemert v. Racing Co.*, 573 F.2d 733, 736 n.4 (2 Cir. 1978), vacated en banc, 590 F.2d 433 (1978), *aff'd* 444 U.S. 472 (1980).

Partners stated, "(e)specially when a dispute centers on the sufficiency of a settlement fund rather than allocation of a fund, majority opposition to a settlement tends to indicate that the settlement may not be adequate since class members presumably know what is in their own best interests." 674 F.2d at 462; emphasis ours.

B. Gross Inadequacy of the Settlement. The Court of Appeals correctly assessed the settlement as "essentially a payment of nuisance value." 818 F.2d at 151, 171. In such a situation, many courts reject settlements out of hand. *In re Traffic Executive Association*, *supra*; *Seigal v. Merrick*, 590 F.2d 35 (2 Cir. 1978), *aff'ing* 441 F.Supp. 587 (DCNY 1977); *Livman v. J.W. Peterson Coal & Oil Co.*, 73 FRD 531 (DC Ill 1973) and *Sertic v. Cuyahoga, Lake Geauga and*

Ashtabula Counties Carpenters District Council, et al., 459 F.2d 579 (6 Cir. 1972). But the courts below in this case rationalized that, even if the amount of the settlement was "grossly inadequate", it became "reasonable" because the plaintiffs really had no cause of action at all. This conclusion reflects a shocking disregard for the evidence in the record.

Despite the fact that the plaintiffs overcame in the trial court repeated summary judgment motions on the military contactor defense and the defendants, in the face of mountains of evidence, were realistic enough not to even seek summary judgment on causation - the courts below in effect granted side-door summary judgments on those issues when they passed upon the "reasonableness of the settlement", without giving the class members the rights they would have

had under Rule 56. The courts below ignored the imprimatur of Rule 56 that *Grinnell I* placed upon class action settlements:

Whenever ... liability has been *prima facie* established (in a class action), any party wishing to justify a settlement offer that amounted to only a small fraction of the ultimate possible recovery would appear to have a very substantial burden of proof."

495 F.2d at 455. For a more detailed discussion of those issues, we respectfully refer the Court to the Petition for Writ of Certiorari being filed with respect to the opt-outs. *Lombardi v. Dow*. However, we dare not pass on without some appropriate comments.

C. The Military Contractor Defense. Since this Court has already granted certiorari in *Boyle* and *Shaw*, we respectfully request that certiorari be granted in this case - for similar reasons. The need for consideration by

this Court is made apparent by the confusion which now exists in the courts with respect to the criteria being applied to the military contractor defense. Varying and different shades of these formulations can be found in Judge Pratt's holding in 536 F.Supp. at 1056-1058; *McKay v. Rockwell*, 704 F.2d 444 (9 Cir.1983) (adding Governmental immunity requirement); *Brown v. Caterpillar Tractor Co.*, *supra* (defense not available in strict liability cases); *Boyle v. United Technologies*, *supra*; *Tozer v. LTV Corp.*, 792 F.2d 403 (11 Cir. 1986) (mere participation in the preparation of specifications still leaves the contractor immunized); *Tillett v. J. I. Case*, 756 F.2d 591 (7 Cir.1985); *Challoner v. Day & Zimmerman, Inc.*, *supra*; *Merritt v. Guy I. Chapman Co.*, 295 F.2d 14 (9 Cir. 1961) (adding a

"compulsion" requirement); Judge Weinstein's formulations, 597 F.Supp. at 847-851 (dealing with "constructive" knowledge of contractor, "actual" knowledge of the Government and "imputation" of knowledge to the Government); the new theory of the Court of Appeals in this case, 818 F.2d at 190-194 (extrapolating into the comparative knowledge element the issue of "speculative hazards"); and, lastly, the formulation most recently enunciated in *Shaw v. Grunman*, *supra* (adding the requirement that the contractor must advise of known alternative products).

The worst formulation of all is that employed by the Court of Appeals in this case. It sends the message to the chemical companies that: "in any deal with the Government do not test your product; know as little as possible about the potential hazards in your

product; let the hazards remain speculative; that way you can sell the Government all the dangerous products you want to and, even though they kill and injure, you will be immunized from liability." In an era when we are striving to save our planet from chemical inundation, this somehow does not seem to be a position that is correct morally, legally or in the public interest.²¹

In any event, it is truly shocking that the Court of Appeals would not recognize in this case the existence of fact issues as to all elements of the military contractor defense. See *McKay v. Rockwell*, 704 F.2d at 453; *Brown v. Caterpillar Tractor Co.*, 696 F.2d at 256, 257; and *Shaw v. Grumman*, *supra*.

21. The military contractor defense has been criticized as it has been applied in this case. *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 Hofstra Law Rev. 983, et seq.

Agent Orange was bought off the shelf; it was not manufactured in accordance with the specifications approved by the Government;²² and the chemical companies not only recognized that *the decision-makers* in the Government did not know about the presence of the "contaminant" dioxin in the Agent Orange and the true hazards of that deadly compound but, in 1965, they affirmatively conspired to keep the Government from finding out. See excerpts in App. III. We urge the Court to grant certiorari in this case and, whatever formulation it eventually decides to adopt, make it clear that the rationale so aptly described by Judge Alarcon in his dissent in *McKay* - that a military contractor should be made to

22. Since the specifications did not mention dioxin, the rule discussed in *Johnston v. United States*, 568 F.Supp. 351 (D.C., Kan. 1983) should control: "... the government contract defense only applies where the injury-causing aspect of the product was mandated by the contract."

stand behind the safety and reliability of "the products for which it voluntarily contracts and provides at a profit", 704 F.2d at 461 - is at the foundation of that formulation.

D. Medical Causation. An unavoidable issue for this Court, we respectfully suggest, is that dealing with medical causation. Judge Weinstein, as Prof. Schuck has disclosed, extended the ripple effect of his medical causation views far beyond the scope of this case by seeking to effectuate a "chill" on all mass toxic tort litigation. *Schuck* at 159, 164. If his views are sanctioned by this Court, medical causation can never be established in cases involving diseases found in the general population without an extensive epidemiological study, the costs of which are generally prohibitive for plaintiffs.

With the future of toxic tort litigation hanging in the balance, the time has come, we sincerely believe, for the Court to decide whether it is going to sanction the hypertechnical, cold and calculating formulae of Judge Weinstein, which demonstrates an almost complete disdain for the Seventh Amendment and the right to trial by jury in toxic tort cases, or the more realistic, particularized and just rule articulated in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C.Cir), cert den., 105 S.Ct. 545 (1984):

Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony."

E. Unilateral Alteration of Settlement. Lastly, *unilateral alterations* of class action settlements, such as those made by Judge Weinstein - in utilizing welfare rather than tort concepts and in disfranchising whole groups and subclasses of plaintiffs - have been seriously condemned. *Pettway*, 576 F.2d at 1172 (district court "cannot

23. How Judge Weinstein and the Court of Appeals could conclude, in the face of the record in this case, that there can be no causation with respect to any of the 248,000 claimants, is incomprehensible. Epidemiological studies should never be the sole measure of a *prima facie* case on causation in toxic tort cases. Every personal injury case is too individualized to be swept away by that broad and undiscerning brush. The exposure is always different. The genetic make-up is always different. The confounders are always different. The clinical picture is always different. In short, every personal injury case, even where the victims have been exposed to the same chemical compound, is different. In any event, the epidemiological studies involving Agent Orange are subject to differing interpretations. See App. IV.

unilaterally change the settlement decree").²⁴

CONCLUSION AND PRAYER

In terms of judicial evolution, it is not an exaggeration to say that this case stands at the cross-roads of a number of critical questions and issues. Whatever is decided in this case will obviously have far-reaching and profound effects upon our body of law. The power-

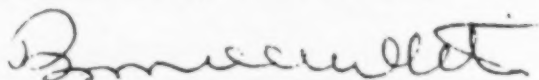
24. See also *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4 Cir. 1975), cert den. 424 U.S. 967 (1976); *In re General Motors*, 594 F.2d at 1133; *Plummer v. Chemical Bank*, 668 F.2d at 655, 656 n.1; *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7 Cir. 1984); *Armstrong v. Board of School Directors*; and *Harris v. Pennsy*, 654 F.Supp. 1042, 1049 (ED Pa 1987) ("The court may either approve or disapprove the settlement; it may not rewrite it."). Nor can the settlement result in the "uncompensated sacrifice of claims of members whether few or many". *TBK Partners Ltd.*, 675 F.2d at 461; *National Super Spud, Inc. v. New York Merchantile Exchange*, 660 F.2d 9, 19 (2 Cir. 1981); *In re Pittsburgh G.L.E.R. Co.*, 543 F.2d 1058 (3 Cir. 1976); and *In re General Motors*, 594 F.2d at 1137.

ful questions of whether this Court will *really* preserve due process in the face of the tremendous class-action momentum that the desire for expediency has generated in recent times; whether the Court will adopt *Ferebee* and make mass toxic tort litigation *really* possible; and whether military contractor defense criteria is formulated by the Court which *really* encourages safety with respect to products used by the military - all desperately need to be resolved. And, in the process of resolving these momentous issues, the anguish of all of us about the Vietnam veteran can be transformed into a brighter place in the conscience of our nation. At the same time, the ground rules can be established for a legal assault upon those actions which could eventually lead to the destruction of

life as we know it.²⁰

WHEREFORE, Petitioners pray the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,



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25. It is appropriate to note the comment of Judge Edwards in *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 636 F.2d 1267 (D.C. Cir.1980) with reference to PCBs (polychlorinated biphenyls) which also generate dioxin with the application of heat: "We feel constrained to add one final note to emphasize our concern in this case. Human beings have finally come to recognize that they must eliminate or control life threatening chemicals, such as PCBs, if the miracle of life is to continue and if earth is to remain a living planet. ... [T]imid souls have good reason to question the prospects for our continued survival, and cynics have just cause to sneer at the effectiveness of governmental regulation." *Id.* at 1286, 1287.

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari have been this the 12th day of October, 1987, placed in the United States Mail, postage prepaid, and appropriately addressed to all adversary counsel of record and one courtesy copy to all others on the district court mailing list has been mailed.


Benton Musslewhite

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Supreme Court, U.S.
FILED

SEP 2 1987

JOSEPH F. SPANIOL, JR.
CLERK

APPENDICIES

NO.

*

IN THE SUPREME COURT
OF THE UNITED STATES

(October Term 1987)

*

BARRY KRUPKIN, ET AL.,
Petitioners,

- v.

DOW CHEMICAL CO., ET AL.,
Respondents.

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

*

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SINGLE APPENDIX

(Re: Certification of Class
and Class Settlement)

*

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APPENDIX I

In re "AGENT ORANGE" PRODUCT
LIABILITY LITIGATION,
Michael F. RYAN, et al., Plaintiffs,

v.

DOW CHEMICAL COMPANY, et al.,
Defendants.

United States District Court,
E.D. New York.

May 28, 1985.

I. INTRODUCTION

On May 7, 1984, a settlement was reached in this class action by Vietnam veterans and their family members against seven chemical companies for injuries plaintiffs believed were caused by exposure of the veterans to Agent Orange and other phenoxy herbicides in Vietnam. The settlement has been found, under the circumstances, to be fair, reasonable and adequate; the reasonable fees and expenses to be paid from the settlement fund to

plaintiffs' attorneys have been determined; and final approval has been given to the settlement. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (EDNY 1985) (Memorandum, Order and Judgment dismissing chemical companies' third-party claims against the United States); 611 F.Supp. 1223 (EDNY 1985) (Memorandum, Order and Judgment dismissing the actions of 281 veterans who opted out of the class action against the chemical companies); 104 F.R.D. 559 (EDNY 1985) (Memorandum and Order lifting protective orders with stay pending disposition of appeals); 603 F.Supp. 239 (EDNY 1985) (Memorandum, Order and Judgment dismissing plaintiffs' claims against the United States); 597 F.Supp. at 876-78 (listing all previously published opinions).

The issue now posed is how to distribute the balance of the settlement

fund - some \$200 million - remaining after payment of attorney fees and expenses. There is no entirely satisfactory answer to the distribution problem. The definition of the class gives guidance only insofar as it requires two conditions for an award to any individual: (1) exposure to Agent Orange in Vietnam, and (2) a claim of injury as a result of that exposure. Because no substantial scientific evidence supports a finding of causal connection between Agent Orange exposure and any specific disease except choloracne, and because of the near impossibility of proving that any particular plaintiff's condition was caused by Agent Orange, dividing the fund among those with particular diseases is unjustified. Dividing the fund equally among all of those who might now or in the future meet the two requirements - exposure and injury - has the appeal of

simplicity, but the individual sums allocated would be too small to provide an appreciable benefit to the recipient.

A number of other suggestions are discussed below. None has as much merit as that proposed by Special Master Kenneth R. Feinberg, Esq. In an elegant solution, he suggests a combination of insurance-type compensation to give as much help as possible to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help. With some slight modifications, the Special Master's recommendations are adopted. The Special Master will be reappointed to oversee implementation of the distribution plan.

The greater part of the fund will be distributed through a payment program to individual veterans and family members in

the form of death and disability benefits. another portion will be allocated to a class assistance foundation to be administered for the benefit of the class as a whole, including the spouses and children of veterans. Finally, two percent of the fund will be allocated if trusts can be established in Australia and New Zealand for disbursement to class members in those countries.

In essence, an insurance policy for death and disability during the period from 1970 to 1995 will be purchased for \$150 million covering each of an estimated 600,000 United States Vietnam veterans exposed to Agent Orange. In addition, a foundation initially funded at \$45 million will be organized to provide services to exposed veterans and their families, particularly those with children having birth defects.

Actual distribution cannot begin until

appeals are decided. The first of these appeals was filed early this year and the last of them probably will not be decided until 1986. Nevertheless, to speed disposition as much as possible, the Special Master is being directed to take all necessary steps to enter into the requisite contracts, set up the necessary organizations, and receive applications for awards so that payments can be made promptly should the appellate courts approve. Payments to members of the class necessarily will be stayed pending the final decisions on appeal.

Recovery is limited by the definition of the class certified. It consists of certain Vietnam veterans and their family members:

The plaintiff class is defined as those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were

injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxy-acetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 729 (EDNY 1983), *mandamus denied*, 725 F.2d 858 (2 Cir.), *cert denied*, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984) (emphasis added). The term "Agent Orange" as used in this and earlier opinions refers to other phenoxy herbicides - Agent Orange II, Agent purple, Agent Pink and Agent Green - as well as Agent Orange. The settlement

covers the claims of all class members. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 862-66 (EDNY 1984) (reprinting settlement agreement).

Distribution of preliminary claim forms began in June 1984. Class members wishing to participate in distribution of the settlement fund were required to submit claims forms by the filing deadline if the injuries believed to be related to Agent orange exposure had already become manifest. Those who later learn of adverse health effects previously unknown to them are required to file claims within 120 days of acquiring that knowledge.

The original filing deadline of October 26, 1984 was extended twice at the request of various veterans groups. The final deadline required claim forms to be delivered or postmarked by January 15, 1985. Special provision was made for veterans whose names were on a list

provided by the Veterans Administration in December 1984. A postcard was mailed to each of these individuals with instructions to sign and return it if that person had not previously received a claim form; once a claim form had been mailed, that individual had 30 days to complete and return it. Similarly, a person who wrote or called requesting a claimform by January 2, 1985 was given 30 days to complete and return a claim form once one had been mailed to that individual.

To date, about 245,000 claims have been filed with the Agent Orange Computer Center, the facility that has been processing claim forms under court supervision. About 12,000 of them were filed after the applicable deadline.

A significantly higher number of claims has been received than was originally anticipated. The aggregate number of claims submitted, however, has little

bearing on the question of how many claims have any merit. Many claims appear to have been submitted because various organizations have advised veterans to file claims whether or not anything was wrong with them and whether or not any problems they may have could conceivably be related to Agent Orange exposure. See Memorandum of Agent Orange Plaintiffs' Management Committee in Opposition to Report of the Special Master Pertaining to the Disposition of the Settlement Fund, filed May 7, 1985, pp. 7, 14.

The \$180 million settlement fund has been accruing interest since the date of settlement and now totals over \$195 million. On January 7, 1985, attorney fees and expenses amounting to about \$9.3 million were awarded. This award has not been paid pending appeals. Motions for reconsideration of a number of these fee awards are presently pending before the

Magistrate. The portion of the settlement fund available for distribution now amounts to about \$185 million, a figure subject to adjustment when the final decision on reconsideration of attorney fee awards is made. A total of about \$200 million should be available for distribution to the class once appeals have been completed.

Following the public hearing on distribution held on March 5, 1985, the court received a number of submissions that required thorough review. The Agent Orange Plaintiffs' Management Committee had requested and were granted additional time to address the merits of the plan submitted by Special Master Kenneth R. Feinberg. Their comments were forwarded to the court on May 6, 1985. Individual letters from veterans organizations and members of the class received by May 15,

1985 were all considered by the court. The numerous distribution proposals, extensive testimony and other commentary on various proposals all were evaluated carefully in reaching a decision on which plan was most practicable and fair.

II. LEGAL STANDARDS FOR FUND DISTRIBUTION

The court's responsibility for ensuring that a satisfactory and equitable distribution plan is implemented derives from the requirement that settlement of a class action have court approval. Fed.R.Civ.P. 23(e); *see, e.g., Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 173-75 (7th Cir.1982); *Beecher v. Able*, 575 F.2d 1010, 1016 (2 Cir.1978). "Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers." *Zients v. Lamorte*, 459 F.2d 628, 630 (2 Cir.1972).

The Rule 23(e) standard of fairness, adequacy, and reasonableness "applies with as much force to the review of the allocation [plan] as it does not the review of the overall settlement between plaintiffs and defendants." *In re Chicken antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5 Cir. 1982). So long as there is no "abuse of discretion," the district court's decision on distribution details is binding. See, e.g., *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1362, 1365 (9 Cir.1979); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2 Cir.), cert denied sub nom, *Cotler Drugs, Inc. v. Chas. Pfizer & Co., Inc.*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). The broad general powers of the court are enhanced in this case by the settlement agreement itself

granting the court "continuous jurisdiction, control and supervision" of the fund. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). See *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 173 (7 Cir. 1982).

This is a diversity tort class action. A class member's substantive right to recover for personal injuries arises under state law rather than federal law. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 799-816 (EDNY 1984) (conflict of laws and statutes of limitations); 580 F.Supp. 690 (EDNY 1984) (general discussion of conflict of laws). In approving a distribution plan in such an action pursuant to rule 23(e), care must be exercised to see that the plan is consistent with substantive rights to damages governed by state law. See 28 U.S.C. Sec. 2072 (Rules Enabling Act).

Traditionally, a tort plaintiff's entitlement to damages requires a particularized showing of individual causation and injuries. Faithfulness to traditional tort rules in disbursing a class action settlement fund thus would require "the court to weigh the strengths and weaknesses of the claims of each class member against each of the settling defendants," a truly herculean task, "rendered a practical impossibility [if] *** the settling defendants agreed to and did participate only in a joint settlement wherein the breakdown of the contribution from each of the individual defendants was not disclosed." *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1365 (9 Cir.1979). Moreover, in the case of Agent Orange implementation of any distribution plan

based on traditional tort principles is impossible because of a virtual absence of proof of causation, financially impracticable because of administrative costs, and not feasible for other compelling reasons. See *infra* Part III.

Under such circumstances, the consensus of state law, see *In re "Agent Orange" Products Liability Litigation*, 580 F.supp. 690 (EDNY 1984), undoubtedly would permit alternative methods of disbursement to be considered in undertaking "the almost impossible task of determining the distribution of the settlement fund among the myriad claimants." *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1365 (9 Cir.1979).

Alternative methods of distributing a settlement fund may be premised on a rationale similar to the *cy pres* doctrine

of testamentary interpretation. See *West Virginia v. Chas Pfizer & Co.*, 440 F.2d 1079, 1085-91 (2 Cir.), cert denied sub nom. *Cotler Drugs, Inc. v. Chas Pfizer & Co., Inc.* 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971); *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1108-09 (ND Ill 1983), aff'd in pertinent part, 744 F.2d 1252, 1254 (7 Cir. 1984), cert dismissed, 53 USLW 3854 (US May 17, 1985) (No. 84-1266). Since the settlement agreement does not provide for automatic revision of any portion of the settlement fund except on disapproval of the settlement, there is no basis for objecting to the mode of fund allocation among the plaintiffs on the ground that the court lacks *cy pres* authority. See *Beecher v. Able*, 575 F.2d 1010, 1016 n.3 (2 Cir. 1978) (distinguishing fluid class recovery holding of *Eisen v. Carlisle &*

Jacquelin, 749 F.2d 1005 (2 Cir.1973),
vacated and remanded on other grounds, 417
U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732
(1974)).

III. COMPARISON OF VARIOUS

PROPOSALS FOR DISTRIBUTION

A number of general principles and specific suggestions for distribution were put forward at the 1984 Fairness Hearings. See *In re "Agent Orange" Product Liability Litigation*, 597 F.supp. 740, 858-61 (EDNY 1984). Helpful comments also were made at the March 5, 1985 hearing on proposals for a distribution plan and in many written submissions to the court. Among general criteria proposed were that a simple and easily administered benefits program should be implemented, simple eligibility criteria should be developed to the extent possible, transaction costs such as attorney and expert fees and

administrative overhead should be minimized, those veterans who most needed help should be given the most assistance, a national center for assisting Vietnam veterans should be established, and a fund should be set aside to help children with birth defects. These suggestions have been given substantial weight in developing this distribution order. The various distribution proposals submitted to the court will be described and analyzed below.

A. Postpone Distribution Until the United States Has Accepted its Responsibility

There is a strong body of opinion among the veterans that a considerably larger fund is required. While this view obviously has merit, no further funds are available from the defendant chemical companies. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp.

740 (EDNY 1984) (opinion on fairness of settlement).

A strong argument has been made by many veterans that the United States should participate in the settlement. The facts developed to date strongly support the view that the government knew or should have known of the dangers involved in the use of Agent Orange and that the government made a calculated - and perhaps justifiable - choice to use the chemicals in order to save the lives of many members of the armed forces and perhaps civilians by making it easier to deal with ambushes from jungle and brush hiding places. The government has refused to discuss settlement and it cannot be held liable as the law has been interpreted. See 597 F.Supp. at 879; 603 F.Supp. 239 (EDNY 1985) (dismissing third-party actions against government).

The government should not, however, refuse to cooperate with the Special Master and others in implementation of the distribution plan. Such cooperation could include access to experts, help in obtaining and interpreting military records, and assistance in coordination with benefit and social service programs. The Social Security Administration and personnel of other government agencies have already been helpful in the process of fashioning a distribution plan.

By passing legislation providing for possible compensation of veterans for Agent Orange exposure, Congress in effect has promised to make adequate compensation available should there be established at any time in the future a satisfactory scientific basis for finding a causal link between Agent Orange exposure and any medical problems from which vietnam

veterans suffer. See Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Publ.L. 98-542, 98 Stat. 2725 (1984). the Act states that "[t]here is some evidence that chloracne, porphyria cutanea tarda, and soft tissue sarcoma are associated with exposure to certain levels of dioxin as found in some herbicides ***." *Id.* Sec. 2(5), 98 Stat. 2725. It establishes a presumption of causation for chloracne, a skin rash, and porphyria cutanea tarda (PCT), a liver disorder, if either of those diseases became manifest within one year of a veteran's departure from Vietnam. In the absence of evidence overcoming the presumption, interim death or disability benefits are payable for the period from October 1, 1984 to September 30, 1986. See *id.* Sec. 9, 98 Stat. 2732; H.R.Rep. No. 592, 98 Cong., 2d Sess. 10-11, reprinted in 1984 U.S.Code Cong. &

Ad.News 4449, 4457; Explanatory Statement of House Bill, Senate Amendment, and Compromise Amendment, 98th Cong., 2d Sess., 130 Cong.Rec. H11161 (daily ed. Oct. 3, 1984), *reprinted in* 1984 U.S.Code Cong & Ad.News 4470, 4477-78.

The Administrator of Veterans' Affairs will appoint a Veterans' Advisory committee on Environmental Hazards, an eight-member panel of which will evaluate scientific studies on the connection between dioxin exposure and adverse health effects. Act Sec. 6, 98 Stat. 2729-30. For diseases other than chloracne, PCT and soft tissue sarcoma, the Administrator after considering the panel's advice will determine whether or not "there is sound scientific or medical evidence" of a causal connection to exposure to dioxin-contaminated herbicides. *Id.* Sec. 5(b)(2)(B), 98 Stat. 2728. For all diseases

meeting this threshold and for chloracne, PCT and soft tissue sarcoma, the Administrator in prescribing regulations for the resolution of claims for benefits will make determinations "based on sound medical and scientific evidence" about whether service connection will be granted in the adjudication of individual cases, specifying the factors to be considered in and circumstances governing the granting of service connection. *Id.* Sec 5(b)(2)(A), (3), 98 Stat. 2728-29.

On April 22, 1985 the Veterans Administration issued proposed regulations to implement the Act. See 50 Fed.Reg. 15, 848-55 (1985) (to be codified at 38 CFR Sec. 1.17, 3.102, 3.311a-3.311b, 3.813). The rules establish a formal procedure for evaluating scientific or medical studies on the connection between dioxin exposure and adverse health effects. They also

fulfill the statutory requirement that the VA issue rules specifying whether an under what circumstances chloracne, PCT and soft tissue sarcomas will be recognized as service-connected.

Proposed section 1.17 provides that, from time to time, the Administrator will publish evaluation is of scientific or medical studies on causation in the Federal Register. It also states that the factors that will be considered in evaluating a study include (1) statistical significance and replicability of the study's findings, (2) whether the study and its findings have withstood peer review, (3) whether methodology is sufficiently described to permit replicaton, (4) whether the findings are applicable to veterans exposed to dioxin, and (5) the views of the appropriate panel of the Veterans' Advisory Committee on

Environmental Hazards. 50 Fed.Reg. 15,852
(to be codified at 38 CFR Sec. 1.17).

Proposed sec. 3.311a addresses the connection between dioxin exposure in Vietnam and specified diseases. It presumes exposure for any veteran who served in Vietnam during the Vietnam era, and provides that the date of the veteran's exposure will be considered to be the date of the veteran's latest departure from Vietnam. 50 Fed.Reg. 15,853 (to be codified at 38 CFR Sec. 3.311a(4)(b)).

Service connection for resulting disability will be granted for chloracne manifested not later than three months from the date of exposure, *id.* (to be codified at 38 CFR Sec. 3.311a(4)(c)), absent a supervening cause. *Id.* (to be codified at 38 CFR sec. 3.311a(4)(3)(e)). No other diseases will be considered

service-connected, because "[s]ound scientific and medical evidence does not establish a cause and effect relationship between dioxin exposure and [any other disease]." *Id.* (to be codified at 38 CFR Sec. 3.311a(4)(d)). Service connection, however, may be granted for a disease shown to have been incurred in or (aggravated by active service. *Id.* (to be codified at 38 CFR Sec. 3.311a(4)(g)). Interim benefits will be available for chloracne or PCT that became manifest within one year after the date of the veteran's most recent departure from Vietnam, under the statutory presumption of causation. 50 Fed.Reg. 15,854-55 (to be codified at 38 CFR Sec. 3.813).

The absence of a sound scientific basis for finding causation and service connection for diseases other than chloracne under section 5 of the Act, and

the narrow scope of presumed causation for certain diseases under section 9 of the Act, suggest that few if any veterans are currently eligible for disability benefits under the Act. No cases have yet been certified as warranting a disability finding for the purpose of receiving benefits. Letter from Arvin Maskin, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, dated May 15, 1985. Should further studies reveal some link between dioxin exposure and the veterans' medical problems, the procedure set up to add diseases to the list of those presumptively considered causally connected is designed to give adequate protection to the veterans.

Unfortunately, the Act did not take into account the widespread fears of genetic and other damage to the veterans' wives and children resulting from the veterans' exposure to Agent Orange in

Vietnam. No substantial showing of causation has yet been made for this category of medical problems, but it undoubtedly would ease the tensions and fears among the veterans and their families if Congress were to expand the scope of the Act to include damage to the veterans' wives and children. Cf. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 853-54 (1984) (discussing limited Veterans Administration benefits currently payable to spouses and children of veterans). If use of the VA as a compensation mechanism were deemed undesirable for administrative reasons, the Advisory Committee panel could report directly to Congress and direct legislative action could be taken on their findings as appropriate. Given the current state of scientific knowledge on causation, the potential cost to the

government of making such compensation available would be negligible, while the benefit in terms of a sense of security and the assurance that the government really does care would be enormous. The Special Master is directed to bring this matter of possible amendment of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act to the attention of appropriate legislative and executive bodies. He shall not, however, lobby in any way on this or other matters connected with the Agent Orange litigation. Lobbying activities would be inconsistent with his judicial role.

So far as a distribution plan is concerned, it clearly is not possible to wait for the government and others to make further funds and resources available. We are dealing with a scarce resource. Many class members have immediate needs, and

much of the value of a settlement lies in the ability to make funds available promptly. the hard choices that must be made in distribution must be made by the court now.

B. Further Research

It is a position of some veterans that further extensive research to determine causation should be undertaken financed by the monies available from the fund. They would hold distribution in abeyance pending completion of such research. This expenditure is not warranted. The government has completed and has under way studies costing approximately \$150,000,000. There is no reason to believe that any studies under court auspices undertaken at this time would add substantially to scientific knowledge, and in the interim no class member would receive any benefit from the settlement. *Cf. In re Folding*

Carton Antitrust Litigation, 744 F.2d 1252, 1254-55 (7 Cir. 1984) (allocation of unclaimed portion of fund to research not permissible when existing efforts would be duplicated), *cert dismissed*, 53 USLW 3854 (US May 17, 1985) (No. 84-1266); *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 859 (EDNY 1984) (waiting for development of perfect plan, assuming one can be devised, loses much of the value of a settlement, which makes funds available immediately). So far as research is concerned, the government has effectively assumed its obligation.

The only research for which the court will authorize funding is that incidental to the work of the class assistance foundation. See *infra* Part V.D. Research-related services could form a valid component of the foundation's program in two limited respects. First, monitoring and

oversight of existing research could be funded to ensure that all research gaps are addressed, that data analysis takes into account all possibilities, and that research is performed thoroughly and efficiently. Second, if financially feasible and to the extent not addressed by other sources, limited funds might be provided for specific, applied research to develop techniques to help treat the medical problems of the class. For example, it may come to the attention of the foundation as a result of the monitoring of some of its grants that particular research is required. There would be no objection to using limited funds to "seed" such research or to seek governmental or private resources to conduct it if the probability of benefit to the class is substantial.

C. Medical Treatment and Health

Care Services

Many class membes have suggested funding a variety of medical treatment and health care services ranging from the establishment of a hospital for Agent Orange class members to the purchase of mecial and health insurance. for a number of reasons, these suggestions cannot be adopted.

The funding of a hospital for the treatment of problems believed to be related to Agent Orange exosure is impractical. Expenditure of the entire settlement fund would be required to set up an institution of any signifcant size. Operation costs would be very great. Evenif the fund were not exhausted by capital expenditures, it soon would be by a variety of required subventions. In general, there is no shortage of hospital

beds in this country. Moreover, even if the proposed hospital were centrally located, very few class members would be able to use it. Providing good hospital care is an obligation of the Veterans Administration.

A medical insurance plan is undesirable for several reasons. First, it would essentially duplicate rather than supplement existing services. The Veterans Administration has been criticized by many class members. Nevertheless, it is obligated to provide free medical treatment to Vietnam veterans who may have been exposed to a toxic substance found in herbicides and whose health problems are not clearly attributable to other causes. See 38 U.S.C. sec. 610. In addition, many if not most class members have access to private medical insurance or are eligible for Medicare or Medicaid.

An Agent Orange medical insurance plan would simply duplicate coverage and perhaps displace benefits provided under private insurance contracts or governmental programs. In effect, the fund would be used to benefit not veterans, but private insurers or governmental assistance programs.

Second, the fund could not afford to provide substantial medical insurance coverage. A program offering comprehensive major medical insurance would be prohibitively expensive. Comprehensive major medical coverage typically costs \$1,000-\$1,200 per person per year for a normal population. Report of the Special Master Pertaining to the disposition of the Settlement Fund, dated February 27, 1985, p. 72 n.33 ("Special Master's Report"). Multiplying this figure by the approximately 245,000 claims already filed

yields a cost of over \$245 million for one year. And this cost does not take into consideration the fact that the claimants are a self-selected population, presumably including many with severe medical problems, so that premiums would have to be much higher than for an average population.

A catastrophic health insurance plan also would be very expensive. For example, catastrophic medical coverage, with a \$100,000 deductible per year, costs about \$100 per year per person for a normal population. Special Master's Report, p. 73 n.34. Doubled for a self-selected population with severe medical problems, and multiplied by 245,000 claimants, the cost would total \$49 million per year. Provision of full coverage for preexisting medical conditions would be even more expensive. such a plan might be affordable

for a few years as the sole program offered by the fund, but it would only benefit those claimants who are relatively well-off. Claimants with severe, long-term illnesses who do not have substantial financial resources or insurance would be unable to pay the costs needed to trigger catastrophic coverage. Such claimants instead would probably receive assistance from various governmental programs. Thus, for the most needy claimants, catastrophic health insurance would provide no additional benefit. Such a program clearly is an undesirable use of the fund.

A fixed-term hospital indemnity insurance plan would be relatively easy to administer and could be made affordable by limiting the total indemnity for each claimant and including a large deductible. But payments would not be high enough to compensate significantly for medical cost.

A hospitalization payment moreover would target settlement funds toward claimants who are not necessarily the most sick, the most disabled, or the most in need. The indemnity plan also might provide an incentive to extend hospitalization unnecessarily.

D. High Compensation for Specific Diseases

The Agent Orange Plaintiffs' Management Committee ("PMC") has proposed that a large group of specified diseases be compensated if exposure to dioxin-contaminated Agent Orange is shown. These diseases are suspected of being associated with dioxin exposure in laboratory studies or industrial settings. This proposal is essentially a tort-based compensation scheme, based upon an assumption of a causal connection between Agent Orange exposure and a given disease. It requires

claimants to submit substantial medical, diagnostic and other proof.

The disease proposed to be compensated include chloracne; peripheral and central neuropathy; various liver disorders including cirrhosis, chronic hepatitis and porphyria cutanea tarda; gastrointestinal conditions; hematological, endocrinal and metabolic problems; all benign and malignant tumors; and birth defects and miscarriages. See Plaintiffs' Preliminary Plan for Allocation and Distribution of Settlement Fund, filed November 26, 1984, pp. 9-13. the PMC's proposal also suggests making payment for some additional medical problems that "seem to have been reported in the literature as possibly accompanying Agent Orange exposure." *Id.* at 13. These allegedly Agent Orange-related problems include arthritis, photophobia, diarrhea, heart burn and abdominal pain. *Id.*

Each claimant who could show that he or she suffered from one or more of these medical conditions would be entitled to be considered for a benefit payment. Each claim would be discounted to reflect the legal problems with the plaintiffs' case. An "individual discount factor" also would be applied to each award to reflect "individual causation risks" - that is, the factual problems that would have arisen in proving each individual class member's claim in court. The method of calculating the "individual discount factor" is not clear, but it would take into account such factors as "exposure to Agent Orange; exposure to dioxin; levels of exposure to Agent Orange and/or dioxin; individual medical history; family medical history; lifestyle considerations; various confounding factors; specific causation; proximate causation; and damages." *Id.* at

14. After legal and factual discounts had been made, each award would be increased or decreased based on other criteria specific to each claimant, including availability of collateral sources benefits and number of dependents. *Id.* at 15.

The PMC's plan suffers from a number of serious defects. Based on the information presently available, no substantial evidence of causality exists as between dioxin-contaminated Agent Orange exposure and any given disease or medical problem, with the exception of chloracne - and chloracne alone should not be compensated according to a spokesman for the PMC. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1285, 1287 (EDNY 1985); 611 F.Supp. 1223, 1260 (EDNY 1985); 603 F.Supp. 239, 245-47 (EDNY 1985); 597 F.Supp. 740, 777-95 (EDNY 1984); H.R.Rep. No. 592, 98th Cong. 2d

Sess 5, 7, reprinted in 1984 U.S.Code Cong. & Ad.News 4449, 4451, 4453; Transcript of March 5, 1985 Hearing, p. 182 (testimony of David Dean, Esq.). Any list of diseases such as that used in the PMC's plan would certainly be open to criticism as arbitrary and lacking in scientific foundation. Moreover, "[t]here is a strong likelihood that even if some causal link could be established between Agent Orange and the diseases from which plaintiffs claim they are suffering, it would be impossible in most cases to identify the individual class members who were injured by Agent Orange." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. at 842. Great controversy would attend the determinations that would have to be made about whether individual claimants' diseases were "caused by" Agent Orange

exposure or would have occurred as part of the normal background incidence of disease in the general population.

Given the lack of scientific basis for general causation and the significant uncertainties involved in proof of individual causation - that is, the indeterminate plaintiff problem - it cannot now be established with any appropriate degree of probability that any individuals who suffer from the diseases listed in the PMC's plan incurred them as a result of Agent Orange exposure, or that these diseases are more likely than others to be causally related.

It is significant that the PMC has never been able to estimate the number of cases of each of the diseases for which it would compensate. Nor has it been able to show any evidence that the incidence of the disease among Vietnam veterans is greater

than among a like population of nonveterans. See *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1223, 1231 (EDNY 1985) (analysis of epidemiological data); 597 F.Supp. 740, 775-95 (EDNY 1984).

Necessarily, the contemplated inquiry would involve a great deal of work by attorneys, doctors and claims administrators. Claimants would have to assemble extensive evidenc including sophisticated medical tests to prove specific diseases. Such a requirement would be burdensome, expensive and emotionally trying for the claimants. The transaction costs of such a distribution plan would be substantial.

The cost of establishing the PMC's "individual discount factor" could be enormous for both the fund and the claimant, depending on the degree to which

the PMC would insist on proof of causation for each individual claimant. Even if a categorical discount factor were established for each disease based on probability of causal connection - a determination that would be speculative at best in light of presently available scientific evidence - many variables unique to each individual would have to be documented and accounted for, all at substantial costs to all concerned.

No comprehensive estimates of the administrative costs to the fund and the costs to individual claimants of producing the requisite medical proof and other documentation has been provided by the PMC. It has been estimated that such a plan might cost as much as \$800 to \$1,000 per claim. See Special Master's Report, pp. 71 n.32, 343. the PMC recently provided a one page estimate of the cost of running a

claims facility. See Memorandum of Agent Orange Plaintiffs' management Committee In Opposition to Report of the Special Master Pertaining to the Dispositn of the Settlement Fund, app., filed May 7, 1985. The underlying assumptions and other bases for the figures provided are not explained. The figures appear to be low for the type and degree of claims processing required by the PMC's plan. Compare *id.* with Special Master's Report, pp. 53-54. Moreover, no estimates of the aggregate transaction costs of the PMC's plan are given.

A probable result of implementing this plan would be that too great a share of the fund would go to lawyers and medical experts in a vain effort to capture a will-o-the-wisp causal connection that simply cannot be established at this time. Moreover, a handful of veterans might get

large recoveries, while the vast majority would get nothing, all on the basis of controversial and speculative causal distinctions. This kind of lottery is inequitable and inappropriate.

The PMC's plan could be modified to eliminate much of the administrative costs and costs to the claimants. The list of compensable medical conditions could be limited to a small number of relatively rare diseases that might be caused by dioxin exposure, diseases that are uncommon in the general population and easily diagnosed. Such a plan would have the seeming virtue of addressing a common, albeit mistaken perception of causality held by even educated laypersons: Because the listed diseases would be unusual, a claimant suffering from one of them might well believe that his or her condition was unique in the general population and that

its cause must be related to the veteran's special experience in Vietnam.

In fact, based on currently available scientific evidence, there is no reason to believe that the incidence of any unusual physical problem is greater among those exposed to Agent orange than among any similar cohort of the unexposed. The number of cases of these diseases among class members could be estimated fairly accurately for past and future years. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 786 (EDNY 1984) (chart showing cumulative expected number of deaths broken down by cause); 611 F.Supp. 1223, 1251 (EDNY 1985) (mortality caused by hepatitis). Class members suffering from such diseases could be ascertained by medical examination. Exposure determinations would be no more difficult than under any other plan. See

infra Part IV.D. Detailed inquiry into "individual discount factors" could be eliminated. Award grids based on severity could readily be devised. The number of awards would be no more than a few thousand.

Such a plan would result in average recoveries of several hundred thousand dollars with relatively low aggregate transaction costs. The same fundamental difficulty associated with any tort-based compensation scheme, however, would persist: No factual basis exists for choosing or excluding any disease, since causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability. The choice of diseases and hence persons to be compensated is essentially arbitrary.

Approval of the PMC plan in any form

would be inconsistent with the court's responsibility to the class under Rule 23(e) to provide for an equitable allocation of the settlement fund. See, e.g., *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174-75 (7 Cir. 1982); *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1363, 1365 (9 Cir.1979); *Beecher v. Able*, 575 F.2d 1010, 1016 (2 Cir.1978); *Zients v. Lamorte*, 459 F.2d 628, 630 (2 Cir. 1972); *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1108-09 (ND Ill 1983), *aff'd in pertinent part*, 744 F.2d 1252, 1254-55 (7 Cir. 1984), *cert dismissed*, 53 U.S.L.W. 3854 (U.S. May 17, 1985) (No. 84-1266).

*E. Death and Disability Payment
Program and Class Assistance
Foundation.*

A distribution plan for a settlement in a tort class action should as far as

possible reflect the traditional tort law principle that individuals will receive monetary compensation for their injuries. See *supra* Part II. the common law generally holds that money damages are a preferred remedy. Many class members apparently have assumed that the distribution would be based on this premise. Accordingly, a major portion of the settlement fund should be distributed in the form of individual awards if at all possible.

To be both practicable and fair, a program of individual benefits must minimize transaction costs, be relatively easy to administer and involve relatively simple, understandable and objective eligibility criteria, while maximizing protection of those said to have suffered as a result of exposure to dioxin-contaminated Agent Orange. The presently

available evidence of causation is far too speculative to serve as the primary basis for a distribution plan, although exposure must be used as an eligibility criterion because of the class definition.

The only realistic means of proceeding with distribution that sufficiently addresses these concerns is embodied in the Special Master's Report. Payments will be made for death and long-term total disability among veterans. See *infra* Part IV. Three-quarters of the settlement fund, or \$150 million, will be set aside for this program, which will be administered by an insurance company or other appropriate disbursing institution or institutions, subject to court supervision. Only those exposed will be eligible.

Under this plan only totally disabled veterans and the surviving spouses or

children of deceased veterans will receive individual cash awards. The class as a whole, however, will benefit significantly in other ways. As discussed *infra* Part V, about one-quarter of the settlement fund, or some \$45 million, will be turned over to a class assistance foundation. The foundation will fund services on behalf of the class as a whole, including aid to children of veterans and their families in coping with birth defects. The foundations work will provide useful and meaningful benefits to those class members not eligible for direct individual awards. About 2.0% of the fund, or \$4 million, will be available to be administered separately for the benefit of Australian and New Zealand claimants. See *infra* Part VI.

Given "the manifest inadequacy of the alternative solutions that have been

proposed," *In re Folding Carton Antitrust Litigation*, 557 F.Supp. 1091, 1109 (ND Ill 1983), *aff'd in pertinent part*, 744 F.2d 1252, 1254 (7 Cir. 1984), *cert dismissed*, 53 USLW 3854 (US May 17, 1985 (No. 84-1266)), this plan provides the only reasonable formula for distribution. See *id.*; *IN re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1328-29 (5 Cir. 1981), *cert denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1388-89 (SDNY 1972) (under across-the-board settlement distribution, "some claimants will receive less than they are entitled to, as a prcentage of actual damage suffered, while others receive more," but "the formula adopted is the only realistic one" available), *aff'd in pertinent part*, 495 F.2d 448 (2 Cir. 1974); *supra* Part II.

IV. PAYMENTS FOR DEATH AND TOTAL DISABILITY OF EXPOSED VETERANS

Under the payment program, individual awards will be made only to exposed veterans who suffer from long-term total disability and to the surviving spouses or children of exposed veterans who have died. A number of reasons exist for channeling individual compensation payments to class members in these categories.

First, the settlement fund, though large in absolute terms, is not sufficient to satisfy the claimed losses of every class member. An "equitable allocation of the large settlement fund [must be made] among the even larger claims of the various class members." *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1363 (9 Cir.

1979). although a meaningful individual cash award cannot be paid to every claimant, a class assistance foundation will be created to fund services to help meet the needs of the entire class. Every class member will be eligible to benefit from this aspect of the distribution plan. See *infra* Part V.

Second, however slight the suggestion of a casual connection between the veterans' medical problems and Agent Orange exposure, even less evidence supports the existence of an association between birth defects and exposure of the father to Agent Orange in Vietnam. See *In re "Agent Orange" Product Liability Litigation*, 597 F.supp. 740, 777-95 (EDNY 1984). This distinction does not imply that the miscarriage and birth defect claims were frivolous: If the spouses and children of the veterans were "completely

without any colorable legal claims against defendants, it would [be] an abuse of the court's discretion to allow them to share in the settlement fund." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5 Cir. 1982). Yet, if one set of claims had a greater likelihood of ultimate success than another set of claims, it is appropriate to weigh "distribution of the settlement *** in favor of plaintiffs whose claims comprise the set" that was more likely to succeed. *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 220 (5 Cir. 1981), *cert denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982). See also *In re Equity Funding Corp. of America Securities Litigation*, 603 F.2d 1353, 1364-66 (9 Cir.1979); *In re Investors Funding Corp. of New York Securities Litigation*, 9 BR 962, 964 (SDNY 1981);

Dunn v. HK Porter Co. Inc. 78 FRD 50, 53-54 (ED Pa 1978); cf. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11 Cir. 1983) ("there is no rule that settlements benefit all class members equally" and "higher allocations to certain parties [may be] rationally based on legitimate considerations").

Third, the plan targets for benefits those veterans who have suffered the most severe injuries. Limiting the program to death and total disability benefits without requiring proof of a specific disease or also minimizes transaction costs, which would almost certainly be overwhelming if any of the other individual award proposals submitted to the court were implemented. See, e.g., *supra* Part III.D. Proof of eligibiity will be relatively simple and will not impose on the applicant the enormous burdens of

producing volumes of medical records and paying expensive medical and legal fees for complicated processing and testing. An outside contractor such as an insurance company has the necessary skills and experience and can process such claims at minimum cost to the fund, particularly because relatively little documentation and handling will be needed. Creation of a costly new claims-processing bureaucracy, which would devour money that should go to class members, thus is avoided. "The proposed method of distribution will maximize the value of the recovery actually received by the class." *Ohio Public Interest Campaign v. Fisher Foods, Inc.*, 546 F.Supp. 1, 11 (ND Ohio 1982).

Finally, this plan "obviate[s] the necessity for particularized proof" and is "a fair response to the particular difficulties that this class would have in

gathering and presenting evidence of damages." In *re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 240 & n.20 (5 Cir. 1982). See also *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260-63 (5 Cir.1974), *cert denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Women's Committee for Equal Employment Opportunity v. National Broadcasting Co.*, 76 FRD 173, 178-79 (SDNY 1977).

In distributing the settlement fund, every possible effort should be undertaken to alleviate the suffering of men, women and children in the class. But compassion, though heartfelt, must be tempered with a down-to-earth sense of what can and what cannot be done. The needs of the class must be weighed against the realities of what can be accomplished given the amount of money available, the danger that

administrative, medical and legal costs will bankrupt the fund, and the premise that if anyone was injured by Agent Orange it was the veterans who were directly exposed. Attainment of a just result requires that a balance be struck among "competing notions of reasonableness," in favor of the veterans themselves. *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1322, 1325 (5 Cir. 1981), cert denied, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982). The choices are difficult, but they must be made.

A. *Compensable Death or Disability*

Awards will be made for the death or total disability of a veteran. All deaths and total disabilities will be compensable, regardless of what disease was the cause, unless predominantly caused by trauma, whether or not self-inflicted. All veteran claimants who filed a claim will receive a notice confirming that they or their eligible survivors may file for compensation upon proof of exposure if death or total disability occurs before the expiration of the payment program. See *infra* Part VII.A.1.

The reasons for limiting compensation to death and total disability have already been stated. The exclusion of traumatic injuries rests on different grounds. the causal connection between Agent Orange exposure and specific health conditions is too speculative to serve as a basis for distribution, but injuries and deaths nevertheless may be excluded as not

compensable if they are manifestly unrelated to Agent Orange exposure - for example, those incurred in automobile accidents, homicides, suicides and war wounds. Given that a relatively limited fund must be distributed among a large number of potentially eligible claimants, it is reasonable and equitable to exclude those claims that are unquestionably unrelated to Agent Orange exposure in Vietnam.

Denial of compensation for all deaths or disabilities resulting from traumatic injuries will eliminate the most prevalent causes of death or disability that are clearly unrelated. It is reasonable to make self-inflicted injuries or suicides ineligible for payment as well, notwithstanding the theoretical possibility that Agent Orange might have contributed in some way to the depression that induced

the injury. A rule that holds veterans responsible for self-inflicted harm will counteract any incentive toward suicide that provision of a death benefit from the fund to a veteran's eligible survivors might unintentionally create.

A rule that excludes traumatic, accidental and self-inflicted injuries will be simple to administer. They are relatively easy to define and determine. Aside from injuries in these categories, all others will be compensable. Few medical conditions are uncontrovertibly unrelated to Agent Orange exposure. A determination of whether one of these conditions caused a particular veteran's death or disability would require complex procedures that would be far too costly and time-consuming.

B. Determining Total Disability

An objective test for disability is

needed that will provide clear, easily administrable guidelines. The enormous expense and time required for individual adjudication hearings must be avoided.

Determinations of long-term total disability will be based on the definition of disability found in the Social Security Act. 42 U.S.C. sec. 301-1397f. Sec. 223 of the Act defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. sec. 423(d)(1)(A).

Use of the Social Security Act definition of "disability" has a number of advantages. First, it would be relatively easy to apply given the extensive

guidelines and precedents already developed under the Social Security program. Second, claimants are likely to be familiar, at least in general, with the elements of disability under this definition. third, it would provide a cost-effective and easily administered eligibiity screen. Since a similar definition of disability is found in many insurance policies, claims processing facilities are already equipped to apply such a definition efficiently and consistently. Fourth, and perhaps mot important, the payment program could minimize some administrative costs by accepting Social Security determinations of disability as evidence of eligibility for veterans who are already receiving disability benefits.

Because reviewing medical evidence to determine whether an individual is disabled involves administrative costs, the payment program to the extent possible

will rely on disability determinations made by the Social Security Administration. Any veteran claimant certified as disabled by the Social Security Administration will be considered disabled for purposes of the payment program, unless the disability was predominantly caused by a traumatic, accidental or self-inflicted injury.

It was recommended by the Special Master that claimants who have not applied for Social Security disability benefits, and who would be eligible for payments under either the Supplemental Security Income (SSI) means test or the Social Security employment test, be required to apply for Social Security and exhaust all appeals within the agency before their application under the payment program would be processed. Special Master's Report, pp. 74-77. Under the Special

Master's proposal, once a veteran had received a final ruling from the agency, he would be entitled to an evaluation of disability by the program, if that ruling were unfavorable.

There is considerable merit to this suggestion. Requiring claimants to apply for Social Security as a prerequisite to independent determination under the payment program would result in significant savings in administrative costs to the fund. This requirement, however, would cause substantial delay in disbursing payment to some claimants, even though the veteran would only need to exhaust his or her appeals within the agency.

In addition, the savings to the fund do not justify burdening the Social Security system with the screening costs of this Agent Orange litigation. The court takes

judicial notice of the fact that the administrative agency is already considerably strained. Placing additional stresses on the process to aid private litigants is arguably against public policy. In any event, it is unwise and this requirement is rejected.

In the absence of a finding of disability under the Social Security administrative process, a claimant will have the right to apply to the disbursing agency for compensation. This right shall exist even if the claimant has applied and been rejected or is awaiting a Social Security disability ruling.

Claimants will be required to submit medical evidence, including records, diagnosis, and test results, similar to that required by the Social Security Administration. In determining whether a veteran claimant is eligible for a

disability award, the payment program will take into account, as evidence, a Social Security determination that the veteran is not disabled, or certifications of disability from other entities such as the Veterans Administration or private insurers.

C. Proof of Death and Eligible

Survivorship

A death certificate ordinarily will be sufficient proof of death. If the certificate does not adequately state the cause of death, further documentation such as medical and hospital records may be required by the disbursing agency to demonstrate that death was not predominantly traumatic, accidental or self-inflicted.

The claimant will be required to establish the deceased's status as a class member veteran and confirm the existence

of at least one eligible survivor - a spouse married to the veteran at the time of death or a dependent child at time of death. No death benefit will be paid if no such eligible survivor is living at the time of application for an award, see *infra* Parts IV.H and V.A, even if the survivor was alive when the initial claim form was filed. If there is a surviving spouse, the death award will be paid to her. If there is no surviving spouse, the death award will be divided equally among the dependent children. If death of a claimant occurs after application but before the award is made, it will go to his or her estate.

Proof of eligible survivorship will be the responsibility of the claimant. Because the name of a surviving spouse is generally listed on a death certificate, verification of eligibility for a spouse

will be straightforward in most instances. The claimant must sign a certificate of dependency for each dependent child. Documentary evidence will be to establish a child's dependent status. Such evidence may include a birth certificate, an adoption order, or a child support order issued by a court.

Use of a dependency test to determine whether surviving children should receive death benefits will to some extent help preserve the fund for the most needy claimants. A dependency test also is consistent with the objective of maximizing benefits to the younger veterans because they are more likely to have dependent children. The increase in administrative costs if any will not be significant.

D. Exposure

Claimants will be required to

demonstrate exposure to Agent Orange or other phenoxy herbicides during military service in or near Vietnam. Exposure is a legitimate and necessary eligibility criterion because it is embodied in the class definition. See *In re "Agent Orange" Product Liability Litigation*, 100 FRD 718, 729 (EDNY 1983), *mandamus denied*, 725 F.2d 858 (2 Cir., *cert denied*, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984)).

The Special Master's Report recommended restriction of eligibility to the 50 percent of veterans most heavily exposed to Agent Orange in Vietnam, on the grounds that "scientists do agree that the possibility of adverse health effects increases as the amount of exposure increases." Special Master's Report, p. 79 (emphasis in original). such a restriction would maximize the individual award to each claimant. The Special Master's Report

also discussed a graduated payment approach, under which "veterans could be divided into three tiers, depending on whether they received low, moderate or high levels of exposure relative to the other veterans." *Id.* at 80. The Special Master favored the 50-percent approach as being easier to administer and allowing the maximum payment to be made to a larger number of claimants. Less highly exposed claimants under the Special Master's plan would receive special consideration in the operation of the class assistance foundation. *Id.* at 81-83.

Objections have been raised to use of either of the exposure options outlined by the Special Master on the ground that it would be divisive, causing widespread dissension among class members. See, e.g., Comments of Vietnam Veterans of America on Plans Pertaining to the

Disposition of the Settlement Fund, pp. 7-10, filed April 10, 1985 ("Comments of VVA"). VVA, although generally supporting the Special Master's plan, opposes making the recommended exposure-based distinctions for two reasons. First, a strong correlation between adverse health effects and degree of exposure should be shown before such a criterion is used in deciding how to allocate the fund. No consensus among scientific experts exists on this point; according to VVA "the scientific evidence is not advanced enough to be confident that there is a strong correlation between degree of exposure and the possibility of injury." *Id.* at 8. Second, VVA states that "[g]iven the exposure information currently available, one cannot place great confidence in the accuracy of determinations on degree of exposure." *Id.*

The points made by VVA and others on the use of a graduated exposure criterion have merit. The Special Master's recommended methodology is based on a fundamental theory of toxicology concerning the dose-response relationship of toxic substances. That theory holds that the greater the exposure, the greater the toxic response. See Special Master's Report, p. 362. So far as is known, all toxic substances act with this dose-response relationship. *Id.* at 371. The theory also has intuitive appeal: If A repeatedly strikes B, B probably is hurt more than if struck only once. But it is possible that - assuming some validity to the theory of causality - individuals could vary greatly in their susceptibility to dioxin-contaminated Agent Orange exposure. Some might not experience adverse health effects though exposed to high levels of

dioxin, while others might fall ill after exposure to relatively low levels. Comments of VVA, p. 8. That is, C, who is struck once, may be injured more seriously than is B, who is struck ten times.

The problems associated with proving degree of exposure and correlating degree of exposure with probability of injury compounds the enormous difficulty of proving causation generally. As already noted, causality is too speculative a basis for distribution. Similarly, the court's duty to ensure an equitable allocation and the desirability of minimizing discord within the class where possible, favor rejection of a graduated exposure factor that lacks a strong empirical basis.

On balance, these concerns outweigh the considerations on which the Special Master relied. Claimants accordingly will be

required to demonstrate exposure, but degree of exposure will not be considered in making individual awards.

Some substantial showing of exposure, however, must be made to ensure that only class members who were exposed receive payment. Exposure is a jurisdictional requirement for class membership. A presumption that all claimants were exposed is not workable. This presumption alternative would reduce the maximum possible payment level because of the increase in otherwise eligible claims. That result would be unfair to a truly exposed class member whose award otherwise would be higher. Thus a presumption of exposure of all Vietnam veterans similar to that employed by the Veterans Administration, see 50 Fed.Reg. 15,853 (1985) (to be codified at 38 CFR sec. 3.311a(4)(b)), cannot be used in

connection with the payment program.

A self-reporting method of determining exposure raises similar problems. Such an approach would be an unreliable index of exposure if used alone:

During the Vietnam war, large areas of land were defoliated for reasons completely unrelated to the use of herbicides. Bombing, shelling, constant resettlement, clearing of forests, and agricultural practices all left their mark. Consequently, a veteran could understandably but erroneously assume contact with Agent Orange because he spent time in an area that was defoliated due to some other cause. Thus, a self-reporting system will not effectively screen claimants for exposure.

Special Master's Report, p. 85. However honest the claimants might be, the number

of otherwise eligible claims probably would increase in the absence of any objective check on the claimants' assertions of exposure. In addition, dishonest claims could not be screened out. Both results would be unfair to the truly exposed class member who otherwise would receive a higher award. The need to ensure an equitable allocation of the fund requires a greater showing of exposure.

Claimants could be required to submit military records demonstrating a likelihood of exposure. Such records could be useful in corroborating other information on exposure. They are, however, too cumbersome, incomplete and lacking in uniformity to serve as the sole basis for exposure determination, or even as the sole adjunct to self-reporting if other alternatives are available.

Under the Special Master's recommendations, a veteran who performed a job involving direct handling or application of Agent Orange, such as backpack spraying, would be deemed exposed. Other veterans would be processed under an objective computerized exposure evaluation system:

The methodology would allow for complex calculations based on information regarding a veteran's service location and on information on spraying operations obtained from the HERBS tape. The HERBS tape is a computerized record of individual herbicide dissemination missions in Vietnam, which was prepared from log books maintained at U.S. military headquarters in Saigon. The HERBS tape contains precise information on the location of spray missions, and both

the type and quantity of herbicide used.

Special Master's Report, p. 86 (footnote omitted).

The HERBS tape does not contain a complete record of herbicide spraying in Vietnam. At present, it accounts for neither pre-1965 aerial spraying nor nonaerial spraying. *Id.* at 95. Agent Orange itself, of course, did not come into use until early 1965, but other phenoxy herbicides had been used earlier. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 775-76 (EDNY 1984). The National Academy of Sciences nevertheless has estimated that the HERBS tape covers about 86 percent of herbicide use in Vietnam, and updated information may become available in the future. Special Master's Report, p. 95 & n.42. The Academy has concluded that the HERBS tape

is a reliable record of herbicide operations. *Id.* at 86 n.41.

The HERBS tape thus can serve as a reasonable starting point for exposure determination in conjunction with military records and claimants' affidavits asserting exposure. Accordingly, the Special Master's recommendation to this extent is adopted. In processing claims, two basic steps will be followed.

First, a questionnaire will be sent to all claimants. In addition to providing information concerning death or disability, each claimant will be asked to indicate the dates and locations of the veteran's Vietnam service. If certain veterans or their surviving families cannot recall this data, the institution administering the payment program insofar as possible will help such claimants and evaluate information about the veterans'

service history. Such assistance might be provided through class assistance foundation. See *infra* Part VII.A.5

The questionnaire also will ask whether the veteran held a job in or near Vietnam involving direct handling or application of Agent Orange. It will include an authorization to obtain military records to confirm the claimant's statements.

Second, the questionnaire data will be analyzed by objective criteria. The following test will be used:

(1) Any veteran who held a job involving direct handling or application of Agent Orange will be considered exposed. This category includes backpack sprayers; sprayers on airplanes, helicopters or boats; and loaders or handlers of spraying equipment. Military records will be used to confirm claims in this category.

(2) All other claims will be evaluated under a computerized process that will compare the veteran's location data with the HERBS tape data to determine the correlation, if any, between the veteran's whereabouts in Vietnam and the location of spraying missions.

Exposure to Agent Orange residues from past spraying as well as to contemporaneous Agent Orange spraying will be considered in making this evaluation, accounting for the possibility that a veteran might have been exposed to Agent Orange not only through his presence in an area during spraying, but also by walking, sleeping or drinking contaminated groundwater in or near a contaminated area will after spraying. But because degree of exposure will not be considered in making awards, and because exposure or its absence will be the central criterion, the

Special Master's recommended evaluation methodology must be modified. The following criteria will be used in determining whether or not a veteran was exposed to Agent Orange for purposes of making awards from the settlement fund.

First, a veteran who was present in a sprayed area when the spraying occurred will be considered exposed. Second, some temporal and geographic limits must be set to determine whether a veteran who was in a location near a sprayed area at or subsequent to the time of spraying will be considered exposed. Because location data has not yet been submitted for the veterans comprising the claims population, the time and place parameters to be used to determine exposure for fund distribution purposes cannot be established with certainty at this time. Nevertheless, some limits will have to be

determined if the exposure requirement is to have any meaning. In order to give preliminary guidance in structuring the payment program, some tentative requirements will be needed. Preliminary and final time and place parameters will be subject to court approval on recommendation of the Special Master or disbursing agency in light of the nature and quality of the data subsequently submitted by claimants.

Because the HERBS tape does not account for all exposures, an appeal process will be available to supplement HERBS tape determinations. Veterans who claim exposure despite a contrary exposure index finding could obtain further consideration of their claims, ordinarily on a written record, through an appeal to an independent board of review. See *infra* Part IV.H.4. The board of review will

consider the veteran's military records and any other documentation submitted by the veteran in rendering a decision.

E. Payment Program Time Limits

Only those who file timely claim forms will be considered for individual awards. See the filing deadline requirements outlined *supra* Part I.

Of the approximately 245,000 claims received as of the date of this opinion, about 12,000 were filed late. The most common reason given for the failure to meet the filing deadline is lack of knowledge of (1) the lawsuit, (2) the need to file a claim, or (3) the deadline itself. The court has the power to accept late claims in the exercise of its equitable discretion. See, e.g., *In re Gypsum Antitrust Cases*, 565 F.2d 1123, 1128 (9 Cir.1977); *Zients v. Lamorte*, 459 F.2d 628, 630-31 (2 Cir.1972); *In re*

Folding Carton Antitrust Litigation, 557 F.Supp. 1091, 1103-04 (ND Ill 1983), *aff'd in pertinent part*, 744 F.2d 1252 (7 Cir. 1984), *cert dismissed*, 53 U.S.L.W. 3854 (U.S. May 17, 1985) (No. 84-1266); *Seiffer v. Topsy's International, Inc.*, 70 FRD 622, 625 n.1 (D.Kan. 1976). Accordingly, all claims filed by the date of this opinion will be considered timely.

No further consideration of claims filed late will be made unless the court determines that good and special reason exists for failure to meet the deadline. Class members seeking compensation from the fund in the future must file a claim form or application for payment within 120 days after the veteran dies or learns of a total disability.

The payment program will run for ten years, beginning January 1, 1985 and ending December 31, 1994. No payment will

be made for death or disability occurring after December 31, 1994. Payment will be made for compensable deaths occurring both before and after January 1, 1985. Payments will be made for compensable disability to the extent that the period of disability falls within the ten years of the program's operation. In addition, initial claimants will receive a premium to account for each year the veteran was disabled in the past, up to a total of 15 years.

The court reserves the right to shorten the ten-year operating life of the payment program should unforeseen circumstances occur, such as an unexpected and prolonged drop in interest rates, or a significant increase in claims about those expected.

F. Structure and Amount of

Disability and Death Benefits

Payment levels will be dependent on the

total number of disabled or deceased veterans for whom claim is made, the number of claimants meeting exposure requirements, as well as other factors relating to how the payment program is structured. The figures set forth below are estimates based on data presently available. They are subject to adjustment, either upward or downward, once supplemental information has been submitted by the claimants.

The figures are derived from (1) quantitative predictions of death and disability based on statistical analysis of a randomly selected sample of claims forms, the court's review of another randomly selected sample of claim forms, and the court's experience with disability claims in Social Security cases, (2) exposure studies and analysis by

scientific consultants, and (3) a cross-check of claimants against Social Security disability rolls. Nevertheless, the information taken as a whole is sufficiently instructive so that it may reasonably be used for purposes of this opinion as a basis for estimating the amount of the awards that ultimately will be made. As more precise data becomes available in the processing of claims by the disbursing agency, firmer estimates of benefits can be made.

1. Disability Benefit

Under the death and disability benefit program outlined in this opinion, it is estimated that the maximum award for disability will be about \$12,800, paid over a ten year period. Under the Special Master's proposed plan, the maximum payment would have been about \$25,000. Essentially, the difference arises from

the higher number of claimants potentially eligible for compensation under the more liberal exposure criteria of the court's plan, see supra Part IV.D, and from the increase in the number of claims over the Special Master's estimate, including late claims that will be accepted for processing. See supra Part IV.E.

Disability awards will be payable in annual installments. Individual awards for disability will vary according to the age of the veteran and the duration of disability. Higher payments will be made for longer disability periods and to younger veterans. Disability awards will end if the period of total disability ends, through either recovery or death.

(a) *Variation in Award Based on Age and Year of Occurrence.* This litigation concerned the exposure of young servicepersons to dioxin-contaminated

Agent Orange in Vietnam. In a young population, the background incidence of disease-connected disability and death is relatively low. Consequently, the disabilities and deaths of young veterans occurring relatively soon after their return from Vietnam are more likely to be perceived as associated with Agent Orange exposure. In contrast, disabilities or deaths occurring many years after service in Vietnam, or among older veterans for whom the background incidence is higher, have a relatively diminished connection with Agent Orange exposure in terms of both public perception and the likelihood of intervening or contributing causes.

The highest total benefit, therefore, will be awarded to those who became disabled soon after exposure at a relatively young age and who continued to be disabled throughout their primary

income-producing years. Implementing this goal while providing significant compensation for existing and future disabilities will require payment levels to be varied according to (1) duration of disability both in the past and in the future, and (2) the veteran's age during the period of disability.

Under this framework, all veteran claimants will receive an award consisting of an incremental payment for each year of total disability after January 1, 1985 through the program's ten year life. That is, an installment payment will be made for each year remaining in the program at the time the claimant becomes totally disabled, if the claimant is totally disabled during the year for which the installment is payable. The question of prorated payment will be addressed during implementation. See *infra* Part IV.F.1.d.

No credit, however, will be given for any year of disability after a veteran's 60th birthday. The few veterans over age 50 at the inception of the program on January 1, 1985 thus will receive lower total awards.

In addition to an award for future disability during the life of the program, a claimant already disabled on January 1, 1985 will receive a premium for each year of past disability, up to a total of 15 years, or beginning January 1, 1970. Because the payment program's emphasis should be on compensation for currently disabled veterans for their existing health problems and for veterans who become disabled in the future, the yearly rate for future disability will be twice that for past disability. Again, no payment will be made for any year of disability after a veteran's 60th

birthday. A veteran turning 50 on or before January 1, 1985 is still eligible for a payment for each year of total disability between January 1, 1970 and the veteran's 60th birthday, though not for payments for future disability.

The claimant not qualified under these guidelines is one who was disabled for 15 full years as of January 1, 1985, remains disabled and under age 60 for the ten year duration of the program, and meets all other eligibility criteria. To permit a \$12,800 award to individuals in this category, the yearly rate for future disability would be set at \$731 and the yearly rate for past disability at one-half the future disability rate, or \$365.50. The maximum future disability award would be \$7,310, and the maximum past disability award would be \$5,482.50, for a total of \$12,792.50. The following

table gives six examples of possible awards based on the estimated \$12,800 maximum. The figures given are based on three assumptions: continuous disability from year of onset of disability; payments to be made in annual installments over ten years; and age of the claimant at 50 or less on January 1, 1985.

[See Chart]

<u>FIRST FULL YEAR OF DISABILITY</u>	<u>TOTAL BENEFIT FOR PAST CONTINUOUS DISABILITY</u>	<u>TOTAL BENEFIT FOR FUTURE CONTINUOUS DISABILITY</u>	<u>TOTAL AWARD</u>
1970	\$5,482.50 (15 years of past disability)	\$7,310 10 years of future disability)	\$12,792.50
1975	\$3,655 (10 years of past disability)	\$7,310 (10 years of future disability)	\$10,965
1980	\$1,827.50 (5 years of past disability)	\$7,310 (10 years of future disability)	\$9,137.50
1985	\$ -0-	\$7,310 (10 years of future disability)	\$7,310
1990	\$ -0-	\$3,655 (5 years of future disability)	\$3,655
1995	\$ -0-	\$ -0-	\$ -0-

Under this payment system, the maximum total award will go to claimants who are age 50 or less as of January 1, 1985 when the program begins, who have been disabled for 15 years or more as of that date, and who remain disabled throughout the program's ten-year duration. This approach targets for maximum payments veterans who

are between the ages of 32 and 50 at the program's inception, who were disabled in 1970 (then between ages 18 and 35), and who remain disabled for the full ten years of the program.

(b) *Onset of Disability and Payment for Past Disability.* The amount of a veteran's award for disability will depend on the duration of the disability. To receive credit for past disability, the claimant must demonstrate the date of onset of disability. For veteran claimants who have been certified as disabled by the Social Security Administration, the program will use the Administrator's determination of the date of onset. For claimants whose date of disability has not been determined by Social Security, the program will apply a presumption that the disability began as of the first day of the program, January 1, 1985, or as of the

date on which the claim is filed, whichever is later. The presumption may be overcome by evidence clearly demonstrating the date of onset. Such evidence would include, for example, a determination of the date of onset made by disability programs other than Social Security, such as those of the Veterans Administration.

(c) *Termination of Payment.* A disability award should end if the period of disability ends, whether by recovery or death. Each award will be paid in annual installments, and payments will cease if during the program's ten-year life either the veteran's condition improves so that he is no longer totally disabled or the veteran dies. If a veteran receiving disability payments dies before the end of the payment program, the veteran's eligible survivors will receive a lump-sum payment at the applicable annual rate for

each full year remaining in the program beginning with the year after the year of death. Payment for the year in which the veteran dies will be at the disability benefit rate rather than the death benefit rate.

(d) *Other Criteria for Calculating Payment.* Criteria must be established to determine the length of time a veteran actually must be totally disabled before becoming eligible for payment, if any; how payments for disabilities beginning and ending during calendar years will be handled; the date of onset of total disability; and the date of termination of total disability, if any. These refinements will be undertaken in implementing the payment program. The administering institution is likely to have far greater expertise in defining this kind of administrative guideline.

Further data is needed from the claimants in any case before eligibility and other criteria can be finalized.

Some examples of the questions that remain to be addressed in implementation are as follows. Because the payment program is intended to compensate long-term total disability, it may be desirable to require a veteran to remain disabled for some period of time - perhaps a year - before becoming eligible for payment; for example, a veteran who becomes totally disabled on July 1, 1985 would have to remain disabled through June 30, 1986. Decisions also must be made about whether and when to award prorated payments for disabilities beginning and ending during a given year. In the example, the veteran might be awarded a payment prorated between the two calendar years of disability - six months at the 1985 level

and six months at the 1986 level (assuming recovery on July 1, 1986). If proration of payment for either onset or termination is considered, the manner of determining the dates of onset and termination must be defined with some specificity. All these matters will be considered further during the actual implementation of the payment program. It is neither necessary nor desirable to address them in approving a general framework for distributing the settlement fund.

2. Death Benefit

Surviving spouses or children of veterans who died before January 1, 1985 are eligible for the maximum death benefit. Survivors of veterans who die on or after January 1, 1985 and before January 1, 1995 will receive an award based on the number of years remaining in the program including the year of death.

The Special Master recommended that

death benefits be substantially lower than disability benefits. Special Master's Report, pp. 113-14. It was felt that a program primarily offering payments to a deceased veteran's survivors might make veterans feel that they were worth more dead than alive. The distribution plan for this and other reasons will place primary emphasis on helping veterans while they are still alive. Provision of a more modest death benefit allows greater compensation to be given to living but disabled veterans.

Under the Special Master's proposal, the maximum death award would be \$5,000, payable in annual installments over the program's ten-year duration. The Special Master recommended an installment-based payment plan to keep funds in reserve for unexpected future claims and to permit higher total benefits by generating

interest. The objection has been raised in submissions to the court that spreading a relatively modest death payment over a ten year period significantly diminishes the benefit to the claimant. The retention of control in disbursement of the funds also might be resented by some claimants.

Death benefits accordingly will be paid in a lump sum. Based on presently available data, the maximum payment will be \$3,400. The cost of providing death benefits will be about \$14 million more than the cost of the Special Master's program, because of the increase in claims that will be considered timely filed. See *supra* Part IV.E.

The maximum death benefit will be payable for a veteran who died before January 1, 1985. Survivors of a veteran who dies during the ten year life of the payment program will receive a lump sum payment equal to the applicable yearly

rate (\$340 per year, based on current data) for each year remaining in the program at the time of the veteran's death including the year of death. For instance, based on present estimates, if a veteran dies in 1989, the survivors will be eligible for a lump-sum award of \$2,040 (\$340 per year for each of the six years remaining in the program).

As previously noted, the amount of a disability award will depend on the age of a veteran. The same variation in death payments must be made for the same reasons it will be made in disability payments. In addition, such a variation will avoid troubling discrepancies. An example will illustrate the problem. A veteran disabled as of January 1, 1985 will turn 60 on January 2, 1986. Under the disability payment program, he would receive an award (\$731, based on current data) for the one

year of disability for which he was under age 60. The veteran may remain disabled for the remaining nine years in the program, but is not eligible for further compensation. but if he dies during 1985, before his 60th birthday, his survivors are eligible for a lump-sum death benefit payable immediately (\$3,060 under present estimates, \$340 per year for nine years), in addition to the disability award he would have received had he lived. Limiting payment to deaths occurring before age 60 would not solve the problem. Preservation of the payment program's emphasis on compensating veterans while still alive thus requires that the age of a veteran at the time of death be considered in computing the death benefit. this procedure additionally will ensure maximum payment for deaths occurring at a relatively young age.

Accordingly, the following guidelines will be followed in awarding death benefits. First, no payment will be made for death occurring at or after age 60. Second, for a veteran who died before January 1, 1985 at an age over 50, the payment amount will be reduced by one year's payment for each year of the veteran's age over 50 at the time of death. For example, if a veteran died in 1975 at age 55, based on currently available data his survivors would be eligible for an award of \$1,700 (\$3,400 minus \$1,700). Third, for a veteran who dies after January 1, 1985 at an age over 50, the lump-sum award will be the total of the incremental payments for each year until the year the veteran would have turned 60, or the end of the payment program, whichever is earlier.

3. Variation in Awards Depending on Number of Subsequent Claims

Even after initial claims and questionnaires have been analyzed and a more detailed operational plan for the payment program has been prepared, the number and nature of future claims will remain uncertain. This uncertainty is one of the reasons the Special Master has recommended that both disability and death benefits be paid on an installment basis. The uncertainty must be taken into account in structuring a distribution plan.

(a) *Disability Payments.* The goal of the payment program will be to pay equal installments in each of the ten years of the program. If future claims increase unexpectedly, however, future yearly installment payments may have to be decreased below the target level set by the first year's payment. If they are less

than expected, the court will determine whether to increase payments to claimants or pay the excess to the class assistance foundation in 1995 for the benefit of all members of the class. See *infra* Part IV.F.5. to make provision for this contingency, the following guidelines will be followed.

The target amount for all yearly payments will be the amount of the first yearly payment. The actual amount of each yearly installment will be fixed in the year before it is payable. It may be lower or higher than the target amount because claims analysis has shown that more or less future claims will be made than originally expected. The size of the next installment payable thus will be "guaranteed." Later installments will not be guaranteed, and may be decreased or increased if future claims are greater or

less than expected.

(b) *Death Payments.* As indicated, death benefits will be payable in a lump sum rather than installments. Payments on future death claims will be subject to adjustment at the time of death, depending on whether more or less claims have been or will be made than anticipated. The target amount for calculating death benefits in any given year of the payment program will be based on the yearly increment used to compute death benefits the first year. The actual amount of each yearly installment will be fixed in the year before it is payable. The death benefit payable in subsequent years may be decreased or increased to account for an increased or decreased number of future claims. See *infra* Part IV.F.5.

(c) *Lump-Sum Versus Installment Payments.* Lump-sum awards for early death,

unlike installment awards, cannot be adjusted in later years to account for a changed incidence of future actual claims as against predicted claims. The number of early death claims and the amount of the resulting death benefits payable, are relatively small. The change in disability installment payments and in late death claim payments to account for increased or decreased future claims therefore will be about the same whether death benefits are paid in a lump sum or on an installment basis.

4. Amounts Payable

The following table gives estimates of the total amounts that will be paid from the program to various categories of claimants. The calculations are based on the following assumptions: (1) 7,500 dead and 17,500 disabled as of the date of this opinion; (2) for those who have not filed

claims as yet, subsequent deaths and disabilities those that would be expected from the general male population of equivalent ages; (3) for those who have filed claims, a somewhat higher incidence of subsequent deaths and disabilities; and (4) an percent annual interest return. The amounts shown as "total paid" include the original \$150 million, plus interest earned over the life of the program, less administrative costs. The "Maximum payment" is the maximum obtainable under all eligibility criteria and qualification factors based on present information. It is subject to adjustment up and down.

	MAXIMUM PAYMENT	AVERAGE PAYMENT	TOTAL NUMBER OF RECIPI- ENTS	TOTAL PAID (Millions)
1. <u>Disability Payment</u> (disability began before January 2, 1985)	\$12,800	\$ 9,600	14,000	\$134.4
2. <u>Disability Payment</u> (disability began after January 2, 1985)	\$ 7,300	\$ 2,400		\$ 40.3
3. <u>Total Disability</u>	\$12,800	\$ 5,700		\$174.7
4. <u>Death Payment</u>	\$ 3,400	\$ 3,400		\$ 20.4
5. <u>Death Payment</u>	\$ 3,400	\$ 1,000		\$ 12.1
6. <u>Total Death</u>	\$ 3,400	\$ 1,800		\$ 32.5
PROGRAM TOTALS	\$12,800	\$ 4,200		\$207.2

The total of \$207.2 million is greater than the \$150 million set aside for the program because of the assumptions about interest rates and dates of payment. Variations in these factors will require adjustments up or down in the payments.

5. *Disbursement of Any Excess Remaining at Program Termination*

If the number of claimants subsequently

found to be qualified under the eligibility criteria discussed above is less than estimated, more funds will be available for disbursement. The Special Master has recommended that any funds remaining at the end of the payment program be transferred to the endowment program of the class assistance foundation to be administered on behalf of the class as a whole, particularly children with birth defects. As the Special master has observed, "[t]he needs of children suffering from birth defects are enormous and long-lasting. Furthermore, as parents pass their prime income-producing years, their ability to care for adult children with birth defects diminishes." Special Master's Report, p. 177. It is even possible that birth defects may increase in frequency or severity in subsequent generations. Thus in the future there may be an even greater demand for assistance from the class assistance foundation than at present.

In light of these considerations, the Special Master's recommendation is both thoughtful and reasonable and is adopted. The court has ample authority to provide

for such a transfer of funds between distribution programs. See, e.g., *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174-75 (7 Cir.1982); *Beecher v. Able*, 575 F.2d 1010, 1016 (2 Cir. 1978); *Zients v. Laworte*, 459 F.2d 628, 630 (2 Cir.1972). The court reserves the right to provide for an upward adjustment of payments to claimants using some or all of any surplus that may develop. Under no circumstances will any funds revert to the defendants.

G.Means and Impact of Payment on

Public and Private Assistance

A means test, by which applicants would be asked to supply information on their personal finances and access to other death and disability benefits, might seem to be a desirable method of extending the effective reach of the payment program by channeling compensation to those with the most need. The nature of our socioeconomic system, however, together with the probable cost of implementing such a requirement, makes a means test virtually impossible to administer. It may do more harm than good at great expense to the fund.

An enormous overlapping complex of

benefits has grown up in our society, in part because of a desire to induce private initiative. The well-to-do undoubtedly may receive more than others: They may be compensated by special retirement and disability schemes of the government and private sectors, private insurance policies, Social Security disability benefits and have, in addition, substantial personal resources preventing economic deprivation. In contrast, the very poorest members of society are least likely to be able to protect themselves by private means or by exploring fully the maze of public benefits. The disparity is almost unavoidable.

Coordination of Agent Orange settlement awards with each applicant's personal resources and public benefits would require claimants to submit a great deal of private information. A substantial amount of administrative work to untangle the threads of collateral sources, including case-by-case determinations and review of numerous documents, would be needed. A means test thus would be both extremely difficult to administer and very costly. Moreover, such an approach would

penalize those veterans who have managed to set aside resources. Accordingly, payment program awards will be made without regard to income or other resources.

There is reason to be concerned about the disadvantaged members of the class. Many class members receive welfare and other forms of need-based public assistance. Such programs may base the amount of benefits on a recipient's resources; they may seek to recoup past payments should a recipient's resources increase. See generally, e.g., Characteristics of State Plans for Aid to Families with Dependent Children (SSA Pub. No. 80-21235, 1984); Characteristics of General Assistance in the United States (HEW Pub. No. (SSA) 78-21239, 1978); Baldus, Welfare as a Loan: An Empirical Study of the Recovery of Public Assistance Payments in the United States, 25 Stan.L. Rev. 123, 125 (1973); Anot., 80 A.L.R.3d 772 (1977). The court has received requests from local welfare agencies and others that any payments to which the individual veteran or his family may be entitled be made to the agency.

Apart from the costs of recovering welfare payments, it seems manifestly unfair to permit welfare and other public assistance agencies to take payments from the Agent Orange settlement fund for past benefits conferred. As Professor Baldus put it:

Recovery may have been a justifiable policy in [the early 19th Century when recovery laws were first adopted], but today the social costs it generates far outweighs the budgetary savings and marginal social benefit it produces. Baldus, *supra*, 25 Stan.L.Rev. at 135. See also *id.* at 125 n.3.

The intent of the settlement and distribution plan is to provide financial help to alleviate some of the suffering of needy class members, not to reimburse state and local governments. A tort settlement, conceptually and in practice, is intended to compensate an individual for injuries to his or her person. Such a monetary recovery is neither income nor resources in the sense of realized gain. See, e.g., *Grunfeder v. Heckler*, 748 F.2d 503, 510-12 (9 Cir. 1984) (Ferguson, Schroeder and Alarcon, JJ., concurring).

ayments from the settlement fund shold, to the extent permitted by law, not be subject to recupment by public assistance agencies.

The equities in future benefits are less compelling. As one judge put it:

[T]here is [a great] difference between denying eligibility for assistance to one with substantial assets in hand derived from a tort claim, and recovering assistance from a former welfare recipient who succeeds in receiving compensation for injuries. In the first case *** the victim has the means of immediate subsistence - a test of eligibility; if the recovery had been [small] instead of [large], he might still be eligible for aid. In the second, the attachment of a meager recovery can effectively destroy the means for future subsistence independence as well as remove the financial comfort given as compensation for physical pain. As a result, self-sufficiency may be jeopardized, and return to relief hastened.

Snell v. Hyman, 281 F.Supp. 853, 872 (SDNY 1968) (three-judge court) (Kaufman, J.,

dissenting), *aff'd* ~~see~~, 393 U.S. 323, 89 S.Ct. 553, 21 L.Ed.2d 511 (1969).

Statutory grounds do exist for exempting settlement fund payments from consideration in determining eligibility for public assistance. Legislation to conform such a result in the case of Agent Orange awards is desirable.

Conflicts between tort compensation principles and public assistance eligibility criteria have arisen most notably in the context of Aid to Families With Dependent Children (AFDC) programs. Section 602(a)(17) of title 42 of the United States Code, a part of the Social Security Act, governs ineligibility for AFDC payments resulting from receipt of nonrecurring lump sum income. It requires state AFDC plans to provide that if an AFDC recipient or certain family members receive in any month "an amount of earned or unearned income" that together with all other nonexcluded income exceeds the state's standard of need for the family, that lump sum will be considered income to that individual in the month received. The family will be considered ineligible for aid for a prescribed period of time. The

nonrecurring lump sum income in effect is treated as a substitute for AFDC. The state at its option may provide for certain narrow extenuating circumstances. 42 U.S.C. Sec. 602(a)(17) (as amended by the Deficit Reduction Act of 1984, sec. 2632, 98 Stat. 1141).

A strong line of authority holds that tort recoveries are not "income," earned or unearned, within the meaning of the AFDC lump sum rule. See *Barnes v. Cohen*, 749 F.2d 1009 (3 Cir. 1984); *LaMadrid v. Hegstrom*, 599 F.Supp. 1247 (WD Va 1984); cf. *Grunfeder v. Heckler*, 748 F.2d 503 (9 Cir. 1984) (Holocaust reparations payments not "income" for Supplemental Security Income (SSI) eligibility purposes).

This position treating recovery from a tort litigation as nonincome is not inconsistent with congressional design. The legislative history of section 402(a)(17) does not clearly define "income." See *Barnes*, 749 F.2d at 1016-17; *LaMadrid*, 599 F.Supp. at 1454-56; *Reed*, 591 F.Supp. at 1255-57; HR Conf. Rep No. 861, 98th Cong., 2d Sess. 1400, 1410-12 (1984), U.S.Code Cong. & Admin.News 1984, p. 697. Tort recoveries are excluded from income under

the Internal Revenue Code of 1954, as amended. I.R.C. sec. 104(a)(2). That Congress has not provided a special definition of "income" in the AFDC statute suggests a plan to use a definition paralleling that used in other federal laws such as the tax laws. *LaMadrid*, 599 F.Supp. at 1457-58; *Reed*, 591 F.Supp. at 1256-57; cf. *Grunfeder v. Heckler*, 748 F.2d 503, 506, 510-12 (9 Cir. 1984) (majority and concurrence point to exemption of Holocaust reparations payments and tort awards generally from definition of income for tax purposes). But see *Betson v. Cohen*, 578 F.Supp. 154, 159 (ED Pa 1983) (absence of specific provision in AFDC statute similar to IRC sec. 104(a)(2) awards, *rev'd on other grounds sub nom. Barnes v. Cohen*, 749 F.2d 1009 (3 Cir. 1984)).

Supporting the statutory argument is the fact tht inclusion of personal injury recoveries as "income" under the AFDC lumpsum rule is contrary to the common meaning of the term "income", which includes the concept of gain. A tort recovery is not a gain but replacement of a loss. As the district court explained in

LaMadrid:

A personal injury award does not increase the measurable worth of the individual receiving the award. *** [A]n award for property damage is an award to replace something lost, like a car or a stove. A personal injury award likewise compensates a person for loss of a resource, whether it be a lost body part or loss of the ability to function in a certain manner. Compensation for person injuries functions to restore the recipient to the status she or he enjoyed prior to the injury. A personal injury awarded merely serves to make the person "whole" or to restore what was lost by the injury. There is not the measurable gain which is an essential part of the common definition of "income."

While no amount of money can actually replace a lost body part, the concept of damages has always been viewed as a way to make the injured party whole.

LaMadrid, 599 F.Supp. at 1456 (citations omitted). See also *Barnes*, 749 F.2d at 1017-18; *Reed*, 591 F.Supp. at 1256; cf.

Grnfeder, 748 F.2d at 511 (concurrency discussing absence of gain from tort award).

Given these considerations, a strong showing should be required before it is concluded that Congress intended to subject personal injury recoveries such as those received from the Agent Orange settlement fund to the AFDC lump-sum rule. Recent decisions to the contrary generally have not addressed the specific issue of whether tort awards are "income" within the meaning of the AFDC statute. See *Walker v. Adams*, 741 F.2d 116 (6 Cir. 1984) (no discussion of issue); *Sweeney v. Murray*, 732 F.2d 1022 (1 Cir. 1984) (no discussion of issue; no statement about whether personal injury award involved); *Duckworth v. Miller*, 127 Ill.App.3d 1088, 83 Ill.Dec. 214, 469 N.E.2d 1148 (1984) (no discussion of issue); *Huckey v. New Mexico Department of Human Services*, 102 N.M. 265, 694 P.2d 521, 526-27 (N.M.Ct.App. 1985) (recognizing issue exists though not presented on appeal; tort award not involved). But see *Littlefield v. Maine Department of Human Services*, 480 A.2d 731, 739-41 (Me.Sup.

Jud.Ct. 1984)(personal injury award not income). Obviously, the matter is not free from doubt; should the matter of AFDC benefits arise in the context of an Agent Orange award, the particular case would require the kind of adversarial hearing not now possible.

A result favorable to the claimant, excluding compensation based on loss, has been reached in the context of need-based public assistance under SSI. See *Grunfeder v. Hickler*, 748 F.2d 503 (9 Cir.1984) (Holocaust reparations not to be considered in determining SSI eligibility). Personal "penitent purpose"; they are designed to compensate for the "deprivation of personal rights." *Id.* at 508. The three concurring judges in *Grunfeder* in fact would have rested the holding in that case on the tort compensation character of the funds received. See *id.* at 510-12.

There are many need-based assistance programs at the federal, state and local levels, including veterans pension benefits. See 38 U.S.c. sec. 503; *Peed v. Cleveland*, 516 F.Supp. 469 (D.Md. 1981). A comprehensive solution to the dilemma faced

by poor veterans and their families requires national legislation. Such legislation also could confirm the result reached in the instant case with respect to recoupment of past benefits. Surely this is the least our country can do for the Vietnam veterans who served it honorably and well, and who have gone so long without the thanks and recognition they deserve.

The Special Master is directed to bring this matter to the attention of appropriate legislative and executive bodies under the same restrictions as set out *supra* Part III.A with respect to birth defect legislation. In the interim, the court will make payment program benefits available on condition that no lien for a preexisting payment or agreement for reimbursement be recognized.

Similar problems may be experienced by class members in dealing with their private insurance carriers. Individual determinations of eligibility for cash compensation under the payment program may not be treated by insurance companies as affecting coverage of class members found eligible. First, the exposure test that will be used is deliberately

overinclusive. See *supra* Part IV.D. It in no way serves as definitive evidence that a veteran was exposed to dioxin at all, much less that he or she was exposed to significant levels of dioxin. Second, the nontraumatic death or disability standard that will be used in lieu of a causation test also is deliberately overbroad. See *supra* Part IV.A. It may not be relied upon as evidence that a particular death or disability is causally related to war activities.

Thus there is no basis either for treating a class member claimant as a high risk because the exposure test has been met, or for invoking a "war related" clause in an insurance policy. Eligibility for payment program compensation may be given no weight in determining private insurance coverage.

H. Implementation and Operati of the Payment Program

Immediate steps are needed to implement the payment program even though payments to claimants cannot be made until appeals are completed. See also *infra* Part VII.

1. Administration by Private Contractors

The court lacks the capacity to administer the program. More appropriate institutions will be required to perform necessary professional and adminisrative services. First, the services of a claims processor or processors will be needed to receive and analyze death and disability claims, maintain records, conduct exposure and death or disability reviews, and make payments. Second, the assistance of actuaries, auditors, investment counsel, and management consultants will be required at various times. Third, expert assistance in drafting claim forms,

exposure assessment, medical disability review, survey research and data processing may be needed. Fourth, experts will be needed to provide requests for bids and perform services preliminary to putting the program into operation.

The need for these professional and administrative services will be intermittent. If in-house staff were hired, the program would be understaffed during busy periods and overstaffed at other times. Use of outside contractors will provide high-quality services during very active periods, but preserve fund resources during less active times. In addition, outside contractors will be able to make a heavy commitment of resources during the first year, to assure prompt and effective implementation of the programs. The fund will avoid the unnecessary start-up and overhead costs of

operating an in-house program.

Good business practices will be followed in procuring services from outside contractors. An open bidding process will be used to ensure that professional and administrative services are obtained at a competitive price. Although overly bureaucratic mechanisms should be avoided, the procedure must be sufficiently formal that any appearance of self-dealing or other impropriety is prevented.

Possible suppliers of services will be contacted by the Special Master. The requirements and constraints will be explained and proposals solicited. For any significant contract, bids will be sought from several providers. See also *infra* Part VII.C.1.

In selecting contractors the following specific criteria among others will be

taken into consideration: ability to supply high-quality and cost-effective service without cost overruns; reputation, experience, expertise and reliability, including past record of delivering quality services on time and within budget; efficiency of operation; sophistication of organization and capacity to minimize bureaucracy and cost; and sensitivity to the concerns and special needs of class member claimants. The services required may be performed by one or several contractors. For example, for processing claims a large institution or consortium of smaller companies might be selected, depending on the advantages presented by their respective proposals. It may be advantageous to have the disbursing agency combined with or separate from the claims processor and investor of funds.

Providing for proper solicitation and bidding will require experts in the field of insurance. Subject to the court's control, the Special Master is authorized to contract with consultants for such service. It must be emphasized to the consultants that protection of the fund, maximum benefits to the class, and low-cost, efficient and high-quality service are prime desiderata. Precautions will be required to ensure that the disbursing or other contracting agency does not receive a windfall should approved payments fall below predictions.

2. Preparation of Application Forms

The preliminary claim form was designed to determine the initial number of potential claimants and solicit general information about them. It was not intended to elicit the detailed information about death, disability and

exposure needed to implement the payment program. Additional data must now be obtained and analyzed. A first step will be to develop detailed application forms that will be sent to all claimants to determine which are eligible for payment.

The forms will be designed to determine whether a veteran meets class membership requirements, including Agent Orange exposure, and whether the veteran is dead or totally disabled. To determine exposure, the application will contain questions regarding the specific dates and locations of the veteran's Vietnam service and veteran's job assignments in Vietnam. to determine whether death or long-term total disability criteria are met, the application will seek information about the veteran's medical condition, whether the death or disability was caused by traumatic, accidental, or self-inflicted

injuries, and whether the Social Security Administration has classified the veteran as disabled specifically for efficient computer processing and analysis.

Experts will assist in drafting the application forms to ensure that necessary information on exposure and disability is elicited, and that computer coded forms are properly designed. It probably would be useful to have the contractor that will receive and pass on claims and make disbursements participate actively in the development of the application form. The completed draft application must be approved by the court.

3. Distribution and Return of Applications

After application forms are developed, they will be mailed to all claimants who will have filed a timely initial claim form. Eligibility criteria and payment

levels cannot be finalized until data from claimants are received and analyzed. To minimize delay claimants will be given 60 days from date of mailing to complete and return the application. Assistance will be provided for claimants who have questions about completing the application. See *infra* Part VII.A.5. Claimants submitting the late applications will not be entitled to receive payment for the first year, but will be eligible for payment in the second year.

4. *Processing and Appeals*

The procedure for processing applications set out below is illustrative only. Details will be modified on the basis of recommendation from the consultants and contracting agency or agencies.

The contract with the disbursing and any other contracting agency shall be arranged so that no greater profit is derived by it through rejection of claims,

thus avoiding a conflict of interest. At the same time internal checks and auditing should ensure use of proper standards in passing on claims.

Once received, an application for payment ordinarily will go through a four-step claims review process: initial screening and data entry, exposure review, death and disability review, and issuance of payment to the qualified applicant. A computerized tracking system will monitor the progress of all application forms.

Applications will be checked for completeness. Then they will be screened to determine whether the applicant claims exposure and death or a qualifying disability. Basic information about the applicant and the claim will be entered into a computerized system that will track the application through the review process. This system will enable the claims

review facility to respond to the applicant's inquiries about the application's progress and to report to the court on the number of claims received and their processing status.

Applications then will be analyzed to determine whether the veteran was exposed to Agent Orange. See *supra* Part IV.D. Those receiving a positive exposure finding will go forward for disability review. Claims based on nontraumatic death or Social Security disability will be verified quickly and sent on for check issuance. Claims without a verified death or Social Security disability finding will receive a disability review. Checks then will be issued to qualified applicants.

The full disability review process will use routine insurance industry procedures to determine medical eligibility for payment. Persons trained in applying

medical criteria and disability guidelines will examine the applications and medical evidence to determine whether a long-term total disability exists. The claimant will be required to submit appropriate documentation, including a statement of diagnosis, relevant test results, and medical history. A doctor's statement of disability without explanation or objective medical evidence ordinarily will be insufficient. For example, the American Medical Association's Guide to the Evaluation of Permanent Impairment may provide guidelines for appropriate medical proof of impairment. The claim reviewers also may take into account evidence that the claimant is or is not deemed disabled under various other disability programs including Veterans Administration programs.

Claimants found ineligible for payment

because of lack of total disability or absence of exposure will be entitled to appeal. A claimant would initiate the process by filing a written statement detailing the basis for the appeal. Assistance in filing appeals could be provided through existing outreach and veterans assistance organizations. See *infra* Part VII.A.5. The appeal will be heard by an independent reviewing authority. It will consist of one or more persons appointed by the court.

An appeal will be based on the written record unless the review board decides otherwise. The review board will determine the appropriate disposition with a brief written statement of its reasons. The decision will be final.

5. Benefit Calculation and Adoption of Final Payment Levels

After all eligibility screening is

complete, an actuary will calculate benefit levels for each class of claimants based on age and duration of disability. See *supra* Part IV.F. Benefit level estimates set forth in this opinion are based on a series of factually based assumptions about the characteristics of the class members and the anticipated number of claims. Once the applications have been processed and analyzed, eligibility criteria may be adjusted. The precise benefit levels then will be calculated. The court will adopt final eligibility criteria and benefit levels and authorize the first disbursements. The Special Master shall expedite setting up the system so that first payments can be made before May 1, 1986, assuming that appeals have been completed by that time. See *infra* Part VII.C.1.

6. Annual Reviews and Continuing

Eligibility Reviews

In addition to the claims review process, which will continue throughout the payment program, various annual reviews will be conducted to adjust program guidelines as future claims are filed. As claims experience is gained, the eligibility criteria and payment levels established in the first year may require modification.

Disability payments will be discontinued if a claimant recovers, dies, or reaches age 60. See *supra* Part IV.F.1.b. Disability claims will be reviewed each year for continuing eligibility. Claimants will be required to provide a brief statement of continuing eligibility in sufficient time to ensure timely check processing and disbursement.

7. Court Control and Reports to the Court

The settlement agreement in this case provides that the "Fund shall be maintained and administered by the Court and shall be under the Court's continuous jurisdiction, control and supervision to assure that the Fund shall earn the maximum interest consistent with safety and that all disbursements are properly made." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). Rule 23(e) of the Federal Rules of Civil Procedure additionally imposes a responsibility on the court to protect the interests of all class members by ensuring that the class settlement fund is distributed equitably. See *supra* Part II. Particularly because the class is large and diverse, the court must continue to supervise distribution until the fund

has been disbursed. Thus this court must exercise continuing control over the assets and disposition of the settlement fund.

Each contracting agency will forward a report to the court at the end of each year in which it supplied services. The report shall be designed to provide detailed information on the financial status of the payment program. The report of the appropriate contracting agency shall recommend the appropriate benefit levels for the next year and set forth the analysis of claims received and projected requirements for compensation of future claimants on which payment level calculations are based. After reviewing the report, and consulting the administering institution as necessary, the court will adopt payment levels for

that coming year. See *supra* Part IV.F.

The annual stockholders' report of the administering institution or its equivalent and such other reports as the court may request will be provided to the court as soon as available. An independent audit will be conducted annually. See *infra* Part VII.C.4. Significant unexplained accounting irregularities, unreasonable administrative cost overruns, fraud, breach of fiduciary responsibilities and similar occurrences will be considered material breaches of the contract to administer the payment program. The court reserves the right to terminate any contract if its responsibility to protect the interests of the class so requires.

B. Veterans Advisory Group

The court will promptly appoint an

advisory group of Vietnam veterans that will be consulted in the planning and development of the payment program. Many class members have expressed the view that veterans should have a significant role in the distribution of the settlement fund. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858 (EDNY 1984). The veterans' sensitivity to the needs of their fellow class members may be valuable in structuring the payment program. The advisory group's views will be solicited on the following matters, among others: bidding procedures; selection of contractors; selection of auditors; development of application forms and an information program; and operation of the payment program. Members of the advisory group will receive no compensation beyond reimbursement of

out-of-pocket expenses.

Members of the advisory group may be appointed to the initial board of directors of the class assistance foundation. See *infra* Part V.B.2. Alternatively, veterans may be appointed to the advisory group whose professional expertise would be of particular value in operating the payment program, but who will not be members of the foundation board of directors. Some overlap probably is desirable, to facilitate exchange of information of interest to both groups. See, e.g., *infra* Part VII.A.

I. Private Attorney Fee Arrangements

The payment program shall be designed to minimize the need for expensive legal assistance by simplifying the quantity and nature of the documentation that a claimant must submit to support his or her application for payment. With the possible

exception of the applications of claimants seeking full independent disability review, *see supra* Part IV.H.4, no legal expertise or special skill of any kind should be needed to complete a preliminary claim form or application for payment, or to obtain military records or records relating to findings of disability or cause of death. The institutional or institutions selected to administer the payment program will so far as possible assist claimants in completing payment applications and obtaining necessary records. *See infra* Part VII.A.5.

A number of class members filing claim forms have indicated that they are represented by counsel. Some of these attorneys may seek to enforce fee agreements with disabled veterans and with families of deceased veterans who are eligible for payments from the program.

The court has already awarded attorney fees and expenses payable from the settlement fund for lawyers' work that benefited the class by contributing to the creation of the fund. See *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (EDNY 1985). All class members, whether or not represented by other counsel, were found to be subject to *pro rata* assessments of the overall fee award against their respective shares of the class settlement. *Id.*, 611 F.Supp. at 1316. Each class member claimant therefore has already paid for all legal work from which he or she received any benefit:

In the instant litigation it is clear that any benefit received by a class member resulting from the creation and distribution of the settlement fund arises from efforts by the relatively few attorneys receiving

fees for time spent in prosecuting the class action. *** The efforts of any other lawyer on behalf of an individual class member client at best contributed less than marginally toward any recovery ultimately to be received by that class member from the fund.

Id. 611 F.Supp. at 1316.

The only other activities of lawyers that arguably benefit a class member claimant receiving a payment program award are the filing of a preliminary claim form, the completion and submission of an application for payment, and the assembling and forwarding of military and medical records. These routine clerical tasks are not the sort of work for which a lawyer should obtain a substantial fee. See, e.g., *Allen v. United States*, 606 F.2d 432, 536 (4 Cir. 1979); *Hoffert v. General Motors Corp.*, 656 F.2d 161, 165-66

(5 Cir.), *reh'g denied*, 660 F.2d 497 (1981), *cert denied sub nom. Cochrane & Bresnahan v. Smith*, 456 U.S. 961, 102 S.Ct. 2037, 72 L.Ed.2d 485 (1982); *Drause v. Rhodes*, 640 F.2d 214, 218-20 (6 Cir.), *cert denied sub nom. Sindell, Lowe & Guidubaldi v. Attorney General of Ohio*, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981); *Dunn v. HK Porter Co., Inc.*, 602 F.2d 1105, 1109-10, 1112 & n.9 (3 Cir. 1979); ABA Code of Professional Responsibility DR 2-106 (A), (B).

The court reserves the right to review private fee arrangements and void or modify them when unreasonable. This power and responsibility arises under Rule 23(e) of the Federal Rules of Civil Procedure and court's supervisory authority over counsel. *Dunn*, 602 F.2d at 1108-10, 1114. It is the law of the case that "[t]he only fee or expense award recoverable from the

settlement fund or a class member's individual recovery is one awarded *** by *** court order." *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1317 (EDNY 1985).

Claimants of course have the right to retain counsel to file their applications for them, however routine the work involved may be. Attorneys who are thus freely retained are entitled to be paid. But fees for such mundane clerical tasks must be modest to be reasonable. Counsel fees accordingly will be subject to court supervision and control. Guidelines for reasonable fees will be set as necessary once the payment program has been implemented and exact eligibility criteria and payment levels are known. Payment program application forms should include information on court supervision of

attorney fees. Clear instructions and help in filling out the forms will be provided to minimize the need for legal assistance. See *infra* Part VII.A.5.

V. CLASS ASSISTANCE FOUNDATION

The majority of claimants will not meet the eligibility criteria for cash compensation under the payment program. Nevertheless many of these claimants may have health problems and other needs. They should receive some benefit from the settlement. Distribution of thousands of small individual payments would trivialize the beneficial impact of the settlement fund on the needs of the class. The most practicable and equitable method of distributing benefits to this segment of the class is through funding of services. See *supra* Parts II, III.D, and III.E, and Introduction to Part IV.

The Special Master has recommended as a

second major distribution program that a class assistance foundation be established to fund projects and services that will benefit the entire class. See Special Master's Report, pp. 151-228. This recommendation as modified below is adopted.

A. General Framework

The fairness opinion discussed many of the suggestions for disposition of the settlement fund that were made at the Fairness Hearings and in other submissions to the court. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858-61 (EDNY 1984). Among these were suggestions that funds be set aside to aid children with birth defects born to class member veterans, and that a national center for Vietnam veteran assistance be established to provide Vietnam veterans and their families with "a visible,

central source of legal and political power." *Id.* at 859.

Maintaining a large part of the fund for a class assistance foundation can serve as a national focus for Vietnam veterans who are class members to mobilize themselves and others to deal with their medical and related problems. Because the foundation will direct the spending of a large pool of money to fund services, it will have a greater impact on the problems of the class than if thousands of small, individual payments were made. In addition, the foundation will provide class members with leverage in seeking to make public and private institutions more responsive to the medical problems of the class. The foundation should be in a position to obtain matching and other grants and contributions from private and public bodies. It will have considerable

leverage to obtain medical and related assistance from existing organizations for members of the class.

1. Funding Priorities

Children with birth defects born to class member veterans should receive special consideration from the foundation. Over 60,000 children are estimated to have had claims filed on their behalf alleging birth defects and health problems resulting from their fathers' exposure to Agent Orange. Even though no currently available scientific evidence establishes any causal link between exposure of veterans to Agent Orange and any birth defect, the desirability of alleviating the suffering of these children and their families is compelling. In addition, the sentiment has repeatedly been expressed to the court that a plan for disposition of the settlement fund should promote harmony

and unity within the class rather than create discord and divisiveness. Class members and veterans group representatives who have made their views known to the court generally agree that something should be done to aid the children with birth defects and their families. See, e.g., *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. at 765-66, 860. Helping meet the needs of these children and their parents should be one of the main priorities of the foundation.

The various distribution proposals and other submissions to the court also demonstrate widespread support for the establishment of legal and social service projects to benefit Vietnam veterans exposed to Agent Orange and suffering some disability and their families. The second major priority of the foundation therefore should be to help meet the medical and

related social service needs of the class as a whole.

Under the Special Master's proposal, \$30 million would be allocated to a children's fund, which would issue grants, contracts and other awards to benefit children with birth defects. Another \$30 million would be used to establish a service fund, which would issue grants, contracts and other awards to help meet the service needs of the entire class. Special Master's Report, pp. 151, 155, 178-89. Under the court's plan, over \$45 million will be allocated to the foundation. This endowment will be administered as a single fund, rather than as two separate funds, allowing greater flexibility in performing the foundation's designed functions.

2. Funding Structure

A general objective in distribution is

to minimize administrative costs so that the settlement fund is conserved and the benefit to the class is maximized. There should be no elaborate bureaucracy. Quality volunteer assistance should be sought in all aspects of administration. Settlement funds should not be used to duplicate existing services.

These principles also apply to the activities of the class assistance foundation. Numerous existing organizations, some with general mandates and others dedicated to veterans only, are currently helping to meet the medical and related service needs of the class. Many provide high quality services but lack the resources to meet class demands. The foundation cannot afford to duplicate already existing services nor should it create a new bureaucracy to fill service gaps. Rather than provide services itself,

the foundation should fund the expansion of existing projects and encourage the creation of new projects to help meet class needs. The foundation thus will take advantage of groups that have already developed expertise and will expose new ways to benefit the class.

The foundation may fund projects that directly benefit individual claimants as well as projects that help the class in general. Foundation funds need not be limited to existing organizations. Seed grants can be provided to create new institutions to serve this class. The foundation should encourage existing service organizations that do not yet focus on the Vietnam veteran community to develop new services for the class. The foundation also may help individual class members in dire financial need by issuing emergency grants or loans.

The class assistance foundation can structure its funding in many different ways. It could, for example, (1) enter into fee-for-service contracts with existing facilities; (2) issue annual grants to organizations to expand their existing projects; (3) provide seed monies to existing groups to help start new projects; (4) issue challenge grants to spur donees to find funding from other sources; (5) issue matching grants to augment funding from other sources; or (6) fund cooperative ventures with other institutions in collective projects. Thus, as a funding rather than service organization, the foundation could extend the reach of its initial endowment, increasing the impact of its program on class problems.

3. *Persons Who Should Receive Services*

Projects funded by the foundation should be designed to benefit the class of persons whose claims are covered by this settlement. See *In re "Agent Orange" Product Liability Litigation*, 100 FRD 718, 729 (EDNY 1983), *mandamus denied*, 725 F.2d 858 (2 Cir.), *cert denied*, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984), *quoted supra* Part I. Funding should be directed to projects that focus on this class rather than on society as a whole or on the general veteran population, even though indirect benefits may flow to this broader group of veterans and family members from the foundation's activities. Some worthwhile projects may not be able to deliver services exclusively to members of the class, but efforts should be made to inform and encourage class members to participate in foundation-funded projects. In addition, the claimants - those class

members who have filed or will file a claim to participate in the settlement - should be the initial focus of projects that provide intensive services to individuals.

Because the foundation forms a part of the distribution plan in his class action, it must require those wishing to use foundation-funded services to prove exposure to Agent Orange in Vietnam. See *supra* Parts I and IV.D. The exposure requirement need not be the same as that used by the payment program. The burden of administering an exposure test as stringent as that of the payment program would be far greater for the foundation, which will be funding services for the entire class. Interposition of a strict exposure requirement would seriously impede the prompt and efficient provision of services to class members. The foundation

thus will be permitted to devise appropriate exposure criteria in light of its mandates and funding priorities. These may include a presumption similar to that used by the Veterans Administration. See 50 Fed.Reg. 15,853 (1985) (to be codified at 38 CFR Sec. 3.311a(4)(b)). The exposure test proposed by the foundation will be set forth in the comprehensive plan to be submitted to the court by the initial board of directors. See *infra* Part VII.C.2. The proposed criteria will be subject to court approval.

Many members of the class are outside the mainstream of society. The foundation in issuing grants or entering into contracts should make efforts to see that funded services reach these people and their families. The special needs of incarcerated veterans, those facing language barriers, those living in rural

areas or on Indian reservations, and those who are isolated from their communities should be considered in reviewing grant applications or contract offers. The foundation should make a concentrated effort to fund projects that will reach this often forgotten segment of Vietnam veteran community. See also *infra* Part VII.A.1.

Children born on or after January 1, 1984 are not members of the class. The settlement agreement states that these afterborn children may elect to receive benefits from the distribution of the settlement fund but that such an election by them or on their behalf waives their right to sue the seven defendant chemical companies for injury from Agent Orange exposure. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864-65 (EDNY 1984). The court has made no

ruling on the enforceability of this implied waiver. An afterborn child who does not seek benefits from the fund is not bound by the settlement agreement. See also *infra* Part VII.A.1.

B. Governance

1. Tax-Exempt Status and Organization in Perpetuity

A basic theme heard during the Fairness Hearings was that class members - Vietnam veterans and their families - should have a significant role in the implementation of any plan for disposition of the settlement fund. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 858 (EDNY 1984). The class assistance foundation affords veterans the unique opportunity to mobilize themselves and others to deal with the enormous problems of the class. Because Vietnam veterans are the most sensitive to the needs and

desires of the class, Vietnam veterans - whether or not they claim exposure to Agent Orange - to the greatest extent possible should govern the foundation.

To facilitate class governance of the foundation, the foundation will be organized as a not-for-profit, tax-exempt entity in perpetuity. The Special Master has had extensive analyses of the issues involved prepared with the aid of volunteer lawyers who generously donated their services. See Special Master's Report, pp. 421-93. The *pro bono* efforts of Lani Adler, Esq. of O'Melveny & Myers and William B. Bonvillian, Esq. of Brown, Roady, Bonvillian & Gold were particularly helpful.

The foundation will have a board of directors, which will implement the foundation's mandate. Creation of a perpetual organization will give class

members an entity that can help meet class needs beyond the 25-year term of the settlement agreement, especially the long-lasting needs of children suffering from birth defects..

Tax exempt status will increase the amount of money available to the foundation for grants to assist the class. Charitable tax status should be considered for the foundation as well. Status as a charitable organization under section 501(c)(3) of the Internal Revenue Code would enable it to obtain charitable contributions tax deductible to the donors.

2. Board of Directors

The court will appoint the initial board of directors to govern the foundation. The initial board will have between 15 and 45 members and will be comprised primarily of Vietnam veterans.

The board membership will reflect a cross-section of the veteran community, cutting across social, gender, economic, geographic and occupational lines. To the extent possible, individuals will be appointed whose experience will be of particular help in implementing the foundation's program. For example, the board may include a health care professional familiar with birth defects, a social service professional familiar with family counseling services, and an attorney with experience in providing legal aid to veterans. Board members will serve without compensation except for reimbursement of reasonable expenses.

Once appointed, the board will be self-governing and self-perpetuating. Terms of service, mechanism for succession, and size of the board will be established in the corporate bylaws,

subject to the initial board's approval.

The board will control every aspect of foundation administration, subject to the responsibilities retained by the court. See *infra* Part V.C.1. It will establish its own internal organization and procedures, including scheduling of meetings and issuance of regular reports. Because of its size, the board should form a number of standing committees and an executive committee to which certain areas of responsibility could be delegated to conduct foundation business more efficiently and effectively. These committees could schedule their own meetings and issue reports to the board for full board action. The Special Master will assist the board as necessary during the initial stages of implementation to establish such internal mechanisms.

The board will determine such matters as investment and budget decisions, specific funding priorities, a detailed grant application process, the actual grant awards, evaluation mechanisms, and fundraising strategies. The board will be responsible for preparation of annual budgets, annual audits, and other financial reports for the foundation, and for submission of these reports to the court for review. See *infra* Part V.C.1. As part of this review, the court may obtain a further independent audit. See *infra* Part VII.B.4.

3. *Executive Director*

The board of directors will be running a foundation with an endowment of over \$45 million and an ambitious agenda over the next quarter-century. It should be assisted by someone having extensive experience with foundations or other charitable

institutions and knowledge about organizations that may be able to provide services to class members.

Accordingly, the court will appoint a committee to search for such a person to serve as executive director of the class assistance foundation. The search committee will be comprised of prospective members of the initial board of directors. The court will consult the committee and review its recommendations before appointing the initial executive director.

Because a highly capable individual with a great deal of expertise is needed, a competitive salary will be offered. The executive director will report to the board and may be discharged by the board. Any successor to the initial executive director will be named by the board. If deemed necessary by the board, the executive director may retain additional

professional and other help.

The executive director's responsibilities should include: (1) helping to define the foundation's funding priorities; (2) soliciting grant applications and contract offers and preparing requests for proposals; (3) evaluating the grant applications and contract offers; (4) recommending projects for funding for broad approval; (5) monitoring the projects funded to ensure that the grantee or the contractor is meeting the needs of the class; and (6) developing mechanisms to leverage the foundation's endowment to increase its ability to meet the needs of the class.

C. Funding and Disbursement

1. Court Supervision of Disbursement

As already pointed out *supra* Part IV. H.7, the terms of the settlement agreement and the responsibility imposed by Rule 23(e) of the Federal Rules of Civil Procedure require the court to exercise continuing control over the assets and disposition of the settlement fund until all funds have been disbursed. A comparatively modest supervisory role in the operation of the class assistance foundation will satisfy these mandates.

All of the money remaining in the settlement fund after the payment program and foreign distribution plans are funded will be allocated to the foundation. Thus the foundation will have an initial endowment of over \$45 million, as a single fund, rather than as two separate children's and service funds. See *supra* Part V.A. This fund may be increased by

court order should experience with the payment fund permit transfers. See *supra* Part IV.F.5.

The Special Master has recommended that the court retain control over the foundation's endowment and its investment for the entire 25-year life of the foundation's program. As stated in this and earlier opinions, class members should have as substantial a role as possible in the governance of the distribution plan. Accordingly, once the foundation is fully operational, the initial endowment will be transferred to the foundation. The board will be responsible for all further investment and budget decisions. Richard J. Davis, Esq., the Special Master for Investment Policy appointed by the court, who is providing his services without fee, will be available for initial consultation.

The board will submit detailed annual budgets, biannual budgetary status reports, and biannual financial and investment statements to the court for review. The court will retain jurisdiction over the foundation and its endowment and will have the power to intervene. The court will retain the power to supervise foundation operations actively and will exercise control as necessary to protect the interests of the class. The court may request further information from the board regarding operations as necessary to carry out its obligation to the class.

This oversight mechanism will enable the court to fulfill its mandated responsibility to supervise all disbursements of the settlement fund. It allows the board of directors to make all procedural and substantive decisions necessary to run the foundation, including investment of the endowment, establishment

of funding priorities and the actual awarding of grants.

2. Rate of Payout and Future Needs

The Special Master's Report discusses the need to balance the competing goals of quick disbursement of significant funds to meet immediate needs versus modest payout in the early years to maintain a substantial endowment for future needs. In resolving this conflict, the Special Master recommended that the board of directors be allowed to invade the corpus of the initial endowment as the board deems necessary to fund projects. See Special Master's Report, pp. 178-95. More money thus would be available to meet the current needs of initial claimants.

Although the Special Master's recommendation is not unreasonable, the court believes that a greater emphasis on meeting future needs is appropriate.

Accordingly, the foundation's endowment will be preserved for the first ten years of the foundation's existence - that is, until December 31, 1994 - and no invasion of corpus will be allowed, except by court order on recommendation of the foundation's board. Only interest and earnings from the initial endowment, plus private and public contributions, will be used to fund projects during the first ten years, unless court permission to invade corpus is sought and obtained - - for example, if an invasion of corpus is necessary to preserve the foundation's tax exempt status.

Under the Special Master's proposal to establish two separate funds to be administered by the foundation, the children's fund endowment was to be disbursed in 25 years. The service fund endowment was to be disbursed in ten years, on the grounds that the service

fund should focus on the "more immediate legal and social service needs of current and future claimants." Special Master's Report, p. 188. The prohibition on invasion of corpus for ten years undercuts the suggested ten-year lifetime. The absence of a reason to set different operational periods for the two funds is a further basis for allocating the entire endowment of the foundation to a single fund covering both mandates.

The foundation fund will have a lifetime of 25 years, the term of the settlement agreement. Assuming a ten percent return on investment, about \$4.5 million will be available annually to the board of directors for the first ten years to fund services. Any money raised by the foundation will be added to this amount and will not be subject to limitations on invasions of corpus. For the remaining 15

years, the board may invade corpus, so that the entire endowment including interest and earnings, but excluding the indemnity reserve discussed below, is disbursed by the end of the 25th year. The rate at which corpus is invaded during the 15-year period will be determined by the board. The requirement that the initial endowment be disbursed in 25 years does not mean that the foundation could not issue grants that provide for services and programs that will remain in operation past the end of the 25-year period.

*3. Indemnity Reserve and Payout of
Balance of Endowment Remaining
After Twenty-Five Years*

The settlement agreement provides that the settlement fund "shall indemnify *** defendants *** for all final compensatory judgments (excluding settlements), exclusive of costs and attorneys' fees,

rendered against any of them in all state-court actions alleging harm caused by exposure to Agent Orange in or near Vietnam, not to exceed an aggregate amount of \$10 million." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). Thus \$10 million must be kept in reserve to indemnify the defendants until May 7, 2008.

The indemnity obligation will be borne by the class assistance foundation rather than the payment program, since the latter will not be in existence for the entire 25-year indemnity period, and an indemnity obligation would unduly hamper its operation. Accordingly, \$10 million of the foundation's endowment must be set aside as an indemnity reserve, and the board of directors may not disburse these funds for any other purpose during the 25-year period of the settlement agreement. The interest and earnings from the \$10 million

reserved will be available for the entire 25 year period to be used by the foundation to fund services for the class.

The settlement agreement stipulates that "[a]fter 25 years from the date of this agreement, any balance remaining in the Fund shall be disposed of in such manner as the Court may direct." *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 864 (EDNY 1984). A substantial balance is likely to remain at the end of that 25 year term because most, if not all, of the \$10 million reserved to indemnify the defendants probably will still be intact. Any such remaining balance will be transferred to the class assistance foundation to continue its work so long as the foundation deems necessary, particularly the funding of services addressed to the needs of children in the class suffering from birth defects. Money

obtained by the foundation through fundraising, of course, may also be used by the board of directors to further the foundation's mandate in perpetuity. See *infra* Part V.F for further discussion.

D. Mandates and Goals in Funding

Services

The broad mandates of the class assistance foundation are twofold: first, to fund projects to aid children with birth defects and their families and alleviate reproductive problems; and second, to fund projects to help meet the service needs of the class as a whole. See *supra* Part V.A. The board of directors will adhere to these broad mandates and will develop funding priorities and award grants to further these mandates. The board will make all decisions about specific funding priorities on a fully independent basis, including the relative

emphasis to be given to each of the broad mandates.

The Special Master's Report contains a number of thoughtful recommendations with extensive accompanying discussion for the guidance of the board of directors in carrying out its mandates. See Special Master's Report, pp. 196-216. This Section will summarize the points made in the Special Master's Report, for the board's consideration.

1. *Possibilities for Funding of Birth
Defect and Reproductive Problem
Programs*

Repeated suggestions were made at the Fairness Hearings that programs be funded to aid children of class member veterans with birth defects. Among the goals suggested to the court were the following:

- encouraging research concerning birth defects, monitoring research to

determine if causal connections can be scientifically verified, and making single or annual grants to assist families with children with birth defects. Such assistance could include, to the extent that funds are available, payment of medical expenses, vocational training, scholarships, and special costs of care and help to ameliorate the difficulties of this portion of the class. Financial and social needs of the family would be appropriate criteria for eligibility.

In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740, 861 (EDNY 1984).

A primary goal of the class assistance foundation accordingly should be to issue grants or contracts for projects that will help children with birth defects lead a more normal life and ease the heavy

burden on the families of these children. A broad definition of the term "birth defect" should be used. Special Master's Report, p. 197 n.70. A second major goal would be to fund projects to meet the service needs of those couples suffering from reproductive problems, including miscarriage-related problems and fear of parenting because of the veteran's exposure to Agent Orange.

(a) *Maximizing Access to Existing Services and Provision of Family Support Programs.* Many children with birth defects have enormous long-lasting needs for medical treatment and health care. The foundation cannot afford to provide would be to help these children and their families take advantage of existing private and public resources. Many existing health care and social service resources are underutilized because people

who could use these resources are unaware of their availability and do not know how to find out what services are available.

Accordingly, priority should be given to funding projects that will maximize access to existing health care and social services for these children and their families. Professor Rand E. Rosenblatt, a health care expert appointed by the court pursuant to Rule 706 of the Federal Rules of Evidence, suggests that "the most effective ways to meet a wide range of unmet needs [are] coordination of care ***, advocacy, and strengthening the family's capacity to deal with the stresses of major childhood illness and disability." Special Master's Report, pp. 511-12. Programs that would further this care coordination approach might include some of the following.

(1) Case management services. Skilled health professionals could train a family

to deal with their child's health problem and work with health care providers and benefit programs to help improve care and benefits.

(2) Protection and advocacy services. Skilled advocates could provide numerous services, including ensuring accurate diagnoses and treatment, improving placements in special education programs, securing appropriate vocational training, establishing family support groups and educating parents, assisting in applications to benefit programs, helping solve housing and transportation problems, and securing community-based living arrangements for institutionalized children.

(3) A public hotline and referral service. Such programs could help families locate the most convenient and appropriate treatment and social service centers.

(4) Grants to hospitals and clinics. This money might assist families, especially those in isolated rural areas, in defraying travel costs incident to a child's medical treatment.

(b) *Additional Projects and Emergency Financing for Medical Services.* Although maximizing access to existing health and social services would be a first priority, to the extent feasible financially and technically the foundation also could fund programs to help meet the medical, educational, vocational, social and other needs of children with birth defects and their families. As the Special Master pointed out, "[i]n many cases, especially as these children grow older and their medical problems become stabilized, needs will change, and the demand for care coordination may decrease." Special Master's Report, p. 202. Potentially

beneficial programs not strictly involving care coordination might include some of the following: (1) affordable, innovative insurance programs for these children; (2) special education grants to help devise new techniques to teach children with learning disabilities; (3) grants to an existing scholarship fund or educational loan program to provide financial assistance for these children, so that they can pursue higher education; (4) grants to establish peer support groups to enable children with birth defects to discuss their problems openly among themselves; (5) vocational training projects, perhaps in cooperation with targeted industries, to provide an opportunity for specialized job training; and (6) limited, focused research to develop new treatment techniques, medical services, and diagnostic tests.

In addition to funding projects, the foundation could set aside a special account to meet emergency needs of children with birth defects and their families. Grants or loans could be provided to families in grave financial need to help pay for essential medical services. These limited emergency grants could be used to help defray the costs of essential medical devices, emergency surgery, or life-sustaining drugs, among other necessary services.

(c) *Reproductive Problems and Genetic Counseling.* The reproductive problems of the class fall within the foundation's mandate. Some class members have stated that they are reluctant to have children because they fear that exposure of servicemen to Agent Orange will result in genetic damage in their offspring. Tens of thousands of claims have been filed for

miscarriages said to be related to Agent Orange. The foundation should consider financing programs for genetic counseling of couples concerned about their future children as well as projects to help couples cope after a miscarriage occurs.

A survey of genetic counseling centers has been made to determine the availability of genetic counseling services for the class. See Special Master's Report, pp. 531-73. The survey contains valuable information on the availability and cost of services, but also highlights the major problem involved in providing classwide genetic counseling: Because no currently available scientific evidence links Agent Orange to any discrete birth defect or combination of birth defects, genetic counselors cannot tell class members what Agent orange "causes," nor can they reassure them that

Agent Orange exposure is harmless. Many Vietnam veterans seeking an explanation for their children's birth defects are frustrated because current genetic counseling services cannot provide definitive answers.

Nevertheless, genetic counseling may have some value for those couples who are still considering having children. A standard genetic counseling session may be of help to potential parents, even though the impact of Agent Orange exposure cannot be assessed. In addition to educating potential parents about general risks of birth defects, genetic counseling services will review family history and assess the particular risks of childbearing for a given couple. The value of such services to class members, however, will decrease in the relatively near future as more and more women in the class grow too old to

have children.

In addition, counseling services and support groups could be funded for class members who have become emotionally distraught in the wake of a miscarriage. The foundation also could fund projects to develop new techniques for counseling couples suffering from reproductive problems they believe are related to Agent Orange exposure.

2. Possibilities for Funding of Class-wide Services

The classwide service program concept originated in the suggestions made to the court during the Fairness Hearings that a national center for Vietnam veterans assistance be established. Such a national center, it was suggested, could perform the following:

provide legal assistance concerning
claims against the Veterans

Administration; undertake litigation to compel agencies of the government to comply with the law and assist Vietnam veterans; seek further legislation in the Congress and state legislatures to improve the lot of the Vietnam veteran; mobilize lawyers, doctors, and the business and education communities to help Vietnam veterans and their families; encourage research and training for the medical profession in treating Vietnam veterans and their families; and undertake such other activities, including counseling and veteran advisory services, as will assist the Vietnam veterans and their families.

In re "Agent Orange" Product Liability Litigation, 597 F.Supp. 740, 859 (EDNY 1984). Other related possibilities

suggested to the Special Master include outreach efforts to all class members, public education and awareness, vocational training and educational assistance. Special Master's Report, p. 152.

The primary goal for funding of classwide services would be to issue grants or contracts for projects that will help meet the medical and related social service needs of Vietnam veterans and their families. This method of providing services differs from the national center idea originally suggested to the court in that the class assistance foundation will fund programs through grants or contracts, whereas the national center was conceived of as an actual supplier of services.

Though many in the class need health care and medical treatment, the government is responsible for providing such treatment and care for the veterans

through the Veterans Administration. See *supra* Part III.A; 38 U.S.C. sec. 610. The foundation, however, could fund projects to help class member veterans sbetter obtain and utlize VA services and to monitor the VA and other federal and state services to ensure that they are responsive to the needs of the class.

In addition to advocacy and monitoring projects that oversee operation of government programs, the foundation could finance projets to (1) increase public awareness of the problems of the class; (2) provide health information to the class; (3) give social service assistance to the class; and (4) help members of the class become a more integrated part of society. Programs funded by the foundation could serve as visible symbols, much like the Agent Orange litigation itself, around which class members can organize to help

themselves.

The issuance of grants or contracts for lobbying of federal and state legislatures should not be undertaken by the foundation. One of the strengths of the existing network of veterans organizations is its collective lobbying ability. Funding of lobbying could duplicate existing efforts and might lead to friction with the existing veterans lobbying network. The foundation should not expend its endowment on lobbying, particularly when many other service gaps exist that need to be filled. Lobbying might well impair the foundation's tax status. I.R.C. Sec. 501(c)(3)-(4).

(a) *National Vietnam Veterans Advocacy Center.* Witnesses at the Fairness Hearings, a number of distribution proposals submitted to the court, and suggestions received by the Special Master

have called for the establishment of a national legal center to help veterans exposed to Agent Orange. Although existing organizations already engage in extensive legislative lobbying efforts at the federal and state levels and provide individual counseling to veterans about their rights, it was felt that an additional need exists for a national legal center that will work for increased Vietnam veteran benefits through litigation and formal administrative proceedings.

Given the level of funding provided, supporting such a legal center seems impracticable. The primary focus of the foundation must be on medical and related problems. Nevertheless, in obtaining medical services for the class, legal problems and litigation needs may arise.

The foundation is therefore authorized to issue grants or enter into contracts with existing organizations to provide advocacy services through a national Vietnam veterans advocacy center or a network of centers. Funds might be used to help pay the costs of test cases of particular interest to the class or individual class members, and to provide medical advocacy to help educate members of the class about VA and other health care programs, increasing their understanding and ability to take advantage of available health services.

The foundation could extend its funding to provide these services in many ways. For example, much of the individual legal assistance could be obtained by contracting with law school clinics, using senior law students who would receive academic credit rather than cash compensation for their services. A grant

could be given to an existing organization to help coordinate and organize *pro bono* activities by the private bar for class members.

(b) *National Hotline and Referral Service, Agent Orange Information Clearinghouse, and Public Education Programs.* The Special Master's suggestions about a national hotline, referral service, Agent Orange information clearinghouse and public educational services also were made by others. See Special Master's Report, pp. 211-15, 574-90 on funding of specific programs. The limited funds available may require giving such projects a low priority.

(c) *Other Projects.* In addition to the programs already discussed, to the extent feasible financially and technically the foundation could provide grants or contract for services to meet the health,

education, vocational and psychological needs of the class members who have filed claims with the settlement fund. Claimants who are not eligible for the payment program, but who suffer from significant partial disabilities or other serious health problems, should receive special consideration. See Special Master's Report, pp. 215-16.

G. Grant and Contract Procedures

The board of directors will be responsible for developing an agenda of priorities and a detailed set of regulations to govern the grant application process and other aspects of the foundation's operations. In developing an agenda and rules, the board will need to work closely with the executive director and such professional consultants, including physicians, lawyers and accountants, as it deems desirable.

1. Development of Specific Funding

Priorities

Before the foundation can begin operations, its funding priorities must be defined by the board. The more focused the priorities, the easier it will be to solicit and evaluate applications, target funds, and monitor activities to ensure that the priorities are being met. The board of directors, with the help of the executive director, thus should produce detailed funding priority statements, subject to modification in the light of experience. Sampling of class members' opinions and direct contacts with members of the class would help the board ascertain class members' views. See Special Master's Report, pp. 217-20. The board itself, however, will take full responsibility for making the hard decisions necessary to operate the

foundation.

2. Grant Application and Review Process

The board of directors should be prepared to initiate a funding process as soon as possible after its members have been appointed by the court. The board will be required to submit a plan for foundation operations to the court within eight months after the appointment of its members. See *infra* Part VII.C.2. In developing procedures for soliciting and reviewing grant applications, the board should consider the following guidelines.

(a) *Open and Competitive Bidding.* The foundation will need to establish the most competitive and efficient system to ensure the best services are obtained for the class. In some cases, the executive director would issue a general request for proposals to allow any group to apply for funding. In other cases, that process

might be inefficient and the executive director probably would ensure better services by soliciting proposals from the existing groups providing the service. If there are very few qualified proposals, the executive director should explain why solicitation of additional proposals would not be likely to result in better services.

(b) *Review of Bids and Monitoring of Ongoing Projects.* The executive director would make the initial review of all grant applications and contract offers and screen out those that do not meet foundation requirements. If necessary, the executive director would refer qualified bids to expert peer review committees for technical and professional evaluation and funding recommendations. The executive director would consider the peer review evaluations and make funding recommendations to the board, which must

approve all grants and contracts.

Peer review committees could be established by the board. They would be comprised of experts in various fields relevant to the foundation's mandates. The experts generally would serve without compensation except reimbursement of expenses. Peer review committees could be established for each of the foundation's general project areas. For example, there could be a peer review committee of health professionals for health-related projects.

The executive director also would develop mechanisms for monitoring and evaluating the performance of service suppliers. One such method would be to condition disbursements of funds on receipt of quarterly status reports and an annual accounting and audit. The expert peer review committees also could be enlisted to help in the monitoring and

evaluation process.

3. Service Suppliers Represented on the Board of Directors

Representatives of existing veterans organizations and state Agent Orange commissions may serve on the board of directors of the foundation. These representatives are likely to be knowledgeable about Agent Orange and Vietnam veteran issues, and such expertise would be a significant asset for the board. The organizations there board members represent probably will have experience in meeting the needs of Vietnam veterans. Therefore, these organizations probably would be interested in and qualified for funding by the foundation.

Funding proposals from these organizations should be encouraged, but self-dealing must be avoided. Accordingly, certain safeguards must be built into the grant process. Whenever an organization

having a representative on the board is recommended for funding by the executive director, full disclosure must be made to the board. In addition, the executive director must fully explain in the recommendation to the board why this organization is the best qualified for funding. The board additionally should develop specific procedural safeguards to ensure fair administration of the foundation. These safeguards would balance the need to encourage existing veterans groups to seek funding from the settlement with the need to eliminate any appearance of impropriety in the funding process.

F. Fundraising

The board of directors should develop fundraising strategies to augment the initial endowment of the class assistance foundation. Money from the initial endowment can be used to initiate fundraising efforts, but such efforts

should become self-supporting as quickly as possible. The prestige and name of the court should not be invoked in any way in fundraising activities. See Canon 5(B)(2) of the Code of Juicial Conduct. No one engaged in fundraising activities should make any reference to the court or any statement that the court endorses or is involved inhe solicitation.

1. *Matching Grants, Joint Ventures
and Similar Devices*

The objective of the foundation is to have as great an impact as possible on problems facing the class. The board and executive director should develop ways to increase the leverage of foundation funding and thus maximize the reach of this program. Grants could be conditioned on the grantee obtaining matching grants from other sources. Cooperative projects funded jointly by the class assistance foundation and other foundations,

organizations or industry could be developed. One-time seed money grants could be used to encourage the creation of new institutions to help the class.

2. Charitable Contributions

The board of directors should seek private donations to augment the foundation's initial endowment from the settlement fund. As discussed *supra* Part V.B.1, in establishing the not-for-profit organization that will govern the foundation, tax-exempt status will be sought, to enable the foundation to obtain individual and corporate charitable contributions. The board should look to these private sources of funds as a way to multiply the beneficial impact of the settlement fund on the class.

Because private donations are outside the scope of the settlement agreement, any additions to the original endowment gained through fundraising would not be subject

to the jurisdiction of the court or the strictures of the settlement agreement.

VI. AUSTRALIAN AND NEW ZEALAND CLAIMANTS

The settlement includes the claims of Australian and New Zealand veterans and their family members as well as those of United States class members. Arguably, because the settlement agreement did not distinguish foreign class members from their American counterparts, Australian and New Zealand claimants should be treated no differently in distributing the settlement fund. Under this view, these class members would submit applications for payment to the payment program and seek services from the class assistance foundation just as would American class members.

But the service needs and desires of the foreign claimants and the availability of government and private services in those countries may differ greatly from

the situation of class members in the United States. Both countries, for example, apparently have more extensive publicly funded health and medical programs than does the United States. An effort should be made to fund projects tailored to the needs of the Australian and New Zealand claimants.

The only practical way of accomplishing this goal is to turn over a portion of the fund to a single organization in Australia and one in New Zealand, to be administered as a trust on behalf of class members in those countries. A single trust institution could be created for Australian and New Zealand class members, or two could be established, one in each country. Such an organization must be established by the government and class members in each country working cooperatively. The court lacks the

resources and requisite familiarity with foreign legal, political, social and economic systems to create an umbrella entity on its own. The trust fund framework, however, must be set up with some degree of consensus. approval will not be given to a proposal hat simply would entrust the funds to one of a number of competing veterans organizations.

The distribution plan adopted by the trust, though subject to court approval, may be completely independent of the plan set out in this opinion. Alternatives rejected here may be practical overseas because of differing circumstances. Any reasonable distribution plan will be permitted. The Special Master will be available for consultation on the creation of a trust institution and formulation of a distribution plan.

If no satisfactory umbrella administrative proposal is forthcoming for a given country, the funds allocable to that nation's claimants will not be administered separately. Such claimants will participate in the payment program and the service the class assistance foundation on the same basis as claimants in the United States. See *supra* Parts IV and V.

Because the needs of foreign class members and the legal and institutional mechanisms required to meet those needs may differ from those of the United States class members, a representative of these foreign class members would be consulted by the foundation's board of directors and the payment program advisory group. The representative should be familiar with the veteran community in his or her country as well as the government and private services available to veterans and their

families.

If an umbrella administrative plan is approved by the court, funds will be allocated in proportion to the number of Vietnam veterans from that country. According to figures provided by the United States Department of Justice, of the total number of Vietnam veterans who served with the United States, Australian and New Zealand armed forces, 2,595,200 were from the United States, 48,400 from Australia, and 3,842 from New Zealand. See Letter from Arvin Maskin, Trial Attorney, Torts Branch, Civil Division, United States Department of Justice, dated March 29, 1985. Foreign veterans from these two allies constitute about 2 percent of the total. Rounding off the figures, 1.8 percent of the settlement fund would be allocated to Australia and 0.2 percent to New Zealand. Of the \$200 million that will

be available, \$4 million thus would be set aside, \$3.6 million for Australia and \$400,000 for New Zealand.

A preliminary trust plan has been submitted for administering the funds allocable to Australian class members. See Draft Memorandum and Articles of Association of Australian Vietnam War Veterans Trust limited, filed March 25, 1985; Letter from Joseph F. Kelly, Jr. dated March 21, 1985, filed March 25, 1985; Letter from Joseph Kelly, Jr. dated April 5, 1985, filed April 10, 1985. The plan apparently has the support of the Australian government and two major Australian veterans' groups - the Vietnam Veterans Association of Australia and the Returned Services League of Australia. The Australian government took an active role in resolving differences among interested parties and in ensuring that a single plan

was submitted for administration of the Australian funds.

Mr. A.T. Gietzelt, Australian Minister for Veterans' Affairs, has informed the court that the Honorable Mr. Justice Leycester Meares, formerly of the Supreme Court of New South Wales, has agreed to be chairman of the trust. The board of trustees would be composed of the chairman, appointed by the Australian Minister of Veterans' Affairs, two members appointed by the VVAA, two appointed by the RSL, one appointed by the Australian Veterans and Defence Services Council, and one appointed by Legacy Coordinating Council, an organization concerned with the care of the surviving spouses and dependents of veterans. None of the trustees will be paid for their services except for out-of-pocket expenses. The trust will be incorporated as a tax-exempt

organization. It also will be able to draw on the administrative resources of the participating organizations, thereby minimizing administrative costs.

The preliminary proposal for an Australian trust fund is under consideration. The organizational framework should be finalized and a distribution plan submitted by October 1, 1985. The Special Master will be available for consultation.

The court has received a number of submissions from counsel and veterans' organizations in New Zealand. The New Zealand government appears to be willing to oversee the establishment of a trust in which the various New Zealand veterans groups would participate, taking a role similar to that of the Australian government regarding an Australina trust fund. As yet, however, the court has not

received a confirmation from the New Zealand government of its willingness to oversee the formulation and submission of a trust proposal as well as the implementation of such a plan once approved by the court. It would be desirable for the chairman of any such trust to be appointed by the New Zealand Minister in Charge of War Pensions or by some other government official, and for the New Zealand government to confirm to the court that any trust proposal submitted has the support of veterans groups such as the New Zealand Returned Services Association, the New Zealand Ex-Vietnam Services Association, and the New Zealand Vietnam Veterans Association. The specific terms of the trust would depend on the provisions of New Zealand domestic law.

No comprehensive proposal for administration of funds in New Zealand has yet been received. No framework for separate distribution can be approved at this time. Further submissions must be received by September 1, 1985. The Special Master is requested to assist interested parties including the New Zealand government in formulating and forwarding an administrative proposal. If a satisfactory plan is not forthcoming by September 1, 1985, New Zealand claims will be handled under the distribution plan outlined in this opinion.

VII. IMPLEMENTATION AND OPERATION OF THE DISTRIBUTION PLAN

Until the appellate process has concluded, no disbursements can be made from the settlement fund, either as individual awards from the payment program or as grants and contracts from the class

assistance foundation. Nevertheless, while appeals are pending all necessary preliminary steps can and should be taken to render the distribution plan as close to fully oprational as possible. These interim organizational efforts will permit the benefits of the settlement to reach the class in a uniform and expeditious manner.

A. Communications with the Class

Effective implementation of the distribution plan will require continuing efforts to inform class members about the settlement, the benefits available from the payment program and the services funded by the class assistance foundation. Because the foundation will be the more permanent institution, funding services with classwide impact across the country, it will bear primary responsibility for informing the class.

Further information also must be collected from the claimants - those class members who have expressed an interest in participating in the settlement by filing a claim form. Because these communications for the most part will relate to the implementation of the payment program, the payment program will bear primary responsibility for collecting more information from claimants.

Insofar as possible, classwide mailings should be coordinated to reduce the drain on settlement funds.

1. Publication of the Terms of the Plan

Even though no subsequent claims for persons who died or became totally disabled more than 120 days ago will be considered timely filed without further order of the court, efforts to encourage participation of class members in the settlement must continue. Veterans and

their families must be made aware of the fact that claims still can be filed for deaths and total disabilities that occur in the future - measured from 120 days before issuance of this opinion. In addition, class members who have yet to file claim forms must be informed of the details of the distribution plan so that they can take advantage of services that will be funded by the class assistance foundation.

Particular emphasis should be placed on efforts to communicate with class members who are outside the mainstream of society. Special efforts of this kind were made in distributing notices of settlement with claim forms to the class. The cooperation of the governors of the states and the Federal Bureau of Prisons was solicited in reaching incarcerated veterans. Claim forms were forwarded to veterans groups

and Hispanic and black organizations for copying and distribution. Information was provided to members of Congress for dissemination. These and similar endeavors must continue to ensure an effective distribution of the settlement fund. Special steps must be taken to reach incarcerated veterans, those facing language barriers, those who live in rural areas or on Indian reservations, and those who are isolated from their communities. See also *supra* Part V.A.3. For example, informational mailings and payment application forms should be translated into Spanish and copies of the translations be made available to Hispanic veterans groups and other organizations.

Various groups can be called on to help inform the class about the provisions of the distribution plan. These groups, moreover, may provide ideas on how best to

serve the Vietnam veteran community. Permanent relationships should be established between the class assistance foundation and groups such as the following: existing veterans organizations and nonprofit veteran service organizations; state government agencies, particularly departments of veterans affairs and state Agent Orange commissions; federal government agencies, including the Bureau of Indian Affairs, the Federal Bureau of Prisons and Veterans Administration facilities, including vet centers; governors of each state and local elected officials; members of Congress; community, social, fraternal and ethnic organizations; and broadcast and print media, through public service messages and public affairs programming.

Notice of the terms of the distribution plan will be provided to those who have

already filed claim forms in the coordinated mailing to all claimants. See *infra* Parts VII.A.3 and VII.A.4. The notice will outline the eligibility criteria for the payment program, discuss the range of services that might be funded by the class assistance foundation, and list telephone numbers and addresses that the claimant can use to obtain further information about these programs and services.

Afterborn children or their guardians who file claims must be informed about the settlement agreement's provision that an afterborn child's election to accept benefits from the settlement fund waives any right to sue the defendants for any claim arising out of the subject matter of this litigation - that is, a claim alleging harm caused by exposure of a parent to Agent Orange in or near Vietnam. A

statement to this effect therefore will be included with the application forms that will be sent to all claimants. Afterborn children who later seek foundation-funded services should be notified of this provision as well.

2. Periodic Notice About the Operation of the Plan

Information about the operation of the distribution plan will be distributed periodically to award recipients through the payment program, and to other class members through the communications network and other means available to the class assistance foundation. Provision of such information to the class is important. The funding of service programs by the foundation would be frustrated if class members did not know that the services were available.

A periodic notice could report jointly on payment program and class assistance foundation operations. It should inform the class of any changes in the eligibility criteria for the payment program and outline services funded by the foundation. It should include information on foundation board meetings and court proceedings concerning the distribution plan.

Existing veterans groups regularly communicate with the Vietnam veteran community. Those responsible for developing and distributing the periodic notice should consult these groups to determine the most effective and cost-efficient method of disseminating information to the class.

3. Mailings to Prospective Payment Program Claimants

Implementation of the distribution plan, particularly the payment program, will require more information to be obtained from claimants. Collection of this information will be given priority. Specific payment program compensation levels, exposure parameters, and the relative weight given to various eligibility criteria all depend on the data to be submitted by claimants. Information collection thus must begin as soon as appropriate forms can be developed.

The Special Master will initiate development of payment application forms with the assistance of consultants. The forms should be simple and easy to understand, so that they can be filled out by class members with a minimum of legal or other assistance. Because of the high cost of communicating with such a large

group, the application forms should be comprehensive so that one mailing will elicit all the information needed. So far as possible, the forms should be designed for computer coding and perhaps optical scanning to facilitate processing. Comprehensive payment application forms will include at least two forms - an exposure questionnaire and an application for payment.

The exposure questionnaire will solicit detailed information on exposure to Agent Orange. See *supra* Part IV.D. Anyone wishing to participate in the payment program must complete this questionnaire. The class assistance foundation may limit certain services based on exposure, or fund a program providing individual exposure assessments. See *supra* Part V.A.3. Claimants wishing to take advantage of services that will be funded by the foundation therefore may be required in

the future to complete and return the exposure questionnaire.

The application for payment must be completed and returned by claimants who wish to be considered for cash compensation from the payment program. The application form will instruct the claimant to include medical documentation regarding the death or disability, and will request the claimant to sign a privacy waiver that will allow access to the veteran's military and medical records. Only spouses or children of deceased veterans, and those veterans who believe they suffer long-term total disabilities, should complete the application for payment. Claims for death or disability from traumatic, accidental, or self-inflicted causes will not be eligible for cash compensation. See *supra* Part IV.A.

In completing the exposure questionnaire and the application for payment, claimants will be made aware that they are submitting information to a court-supervised entity and that they may be subject to penalties for supplying false information. The filing of a false claim in a class action in federal court is a serious federal crime. See 18 U.S.C. secs. 2, 371, 1341. As a safeguard against fraud, each claimant will sign under penalty of prosecution for perjury a statement that the information supplied in the exposure questionnaire and the application for payment is true to the best of the claimant's knowledge.

4. Coordinated Mailings by the Class Assistance Foundation

The foundation board of directors probably will need information to help establish specific funding priorities. See

supra Part V.E.1. If the board develops a services survey and a birth defects questionnaire, efforts will be made to coordinate the mailing of the board's information request with the mailing of the court-approved payment program forms. Such coordination will reduce the cost of data collection. It may increase the response rate as well, since claimants will be solicited only once for detailed information.

5. Assistance for Claimants in Filling Out Forms

Claimants are likely to have questions about the forms and may need help in completing them. Methods should be developed to aid claimants in completing the application forms. Such assistance will involve some initial expense, but it will increase the completeness and accuracy of the data submitted. Provision

of assistance thus will help assure that qualified claimants get the benefits for which they are eligible, and will reduce processing and evaluation costs for the settlement fund. Understandable, step-by-step instructions will do much to eliminate confusion and ensure accurate data collection.

A toll-free telephone number will be provided for claimants who need further assistance. This service will be staffed by trained people who can answer questions about the application forms. Sufficient telephone lines should be used so that claimants can get through to operators without undue delay. Because the toll-free number is likely to be very busy at times, arrangements will be made for an answering tape with basic information and referral numbers to aid callers, who then can wait for the first available operator if the tape does not provide sufficient

information.

The existing national network of veteran service representatives also should be utilized. These service representatives, usually employed by state veteran affairs departments, already help veterans complete information requests from government agencies. A training manual will be developed on how to complete the Agent Orange application forms. This manual will be distributed to all service representatives and to other government agencies, and private organizations that regularly counsel Vietnam veterans. In addition, a series of briefing sessions should be scheduled around the country to inform interested representatives about how to complete the application forms.

The combination of clear instructions, a toll-free telephone number and a network of trained service representatives should

eliminate much of the confusion involved in seeking detailed information from such a large, diverse group. In addition, any other cost-effective means to assist claimants in completing the application forms will be explored.

B. Overall Structure and Financial Matters.

1. Minimizing Adverse Tax Consequences

An important objective of the distribution plan is to maximize the amounts available for disposition. Because the settlement fund will be invested and disbursed over a period of many years, it is important to minimize the negative impact of federal, state and local income taxes on the earnings and gains realized by the fund. Another important goal is to ensure that payment program awards and class assistance foundation grants are exempt from taxation.

Adverse tax consequences will be minimized by seeking an Internal Revenue Service ruling of tax exemption under section 501(c)(3) of the Internal Revenue Code of 1954, as amended, as a charitable organization that serves a public purpose.

Awards from the payment program should be treated as exempt from tax. See, e.g., I.R.C. sec. 104(a)(2) (tort recoveries are not "income"). Similarly, indirect benefits received by class members from the foundation should be designed in a way to avoid being treated as taxable income.

2. Investment

Among the most important responsibilities in administering the settlement programs are protecting and managing the assets of the settlement fund. The principal decision that must be made is the selection of an investment manager or investment managers who will be responsible for investing the fund. The

— court will make this selection after consulting Special Master Feinberg, the Special Master for Investment Policy, Richard J. Davis, the foundation board of directors and the payment program advisory group.

Special Master Davis has already commenced the process of identifying capable and interested investment managers. See Special Master's Report, pp. 599-618. On February 1, 1985, Special Master Davis sent a detailed request for further information to a number of investment managers who previously had indicated an interest in managing the fund. This request for information asked the investment managers to describe how they would propose to invest the assets of the fund. The request for information also asked a series of questions about the financial institution's experience, performance, ability to adjust investment

strategy, and other matters related to the institution's ability to provide service to the fund. In addition, questions were asked about the institution's costs and fees.

Based on the written submissions in response to the questionnaire, Special Master Davis has indicated that he expects to select between four and six finalists. In coordination with Special Master Feinberg, Special Master Davis will interview the finalists, and consult with the payment program advisory group and the foundation board of directors with respect to the interviews. After the interviews, the Special Masters will recommend an investment manager or investment managers to the court. The court will approve or disapprove the selection after consulting the payment program advisory group and foundation board of directors. It may well be desirable to set up the payment program

disbursing agency in the form of an insurance company with power to invest the program's \$150 million fund. If so, adequate protection of the fund's security will need to be provided.

As noted *supra* Part V.C. once the distribution plan is fully operational, the class assistance foundation's endowment will be transferred to it. The board will make all subsequent investment decisions. If the board at any time decides to change investment managers, it will give advance notice in writing to the court before acting.

Investment strategy for both distribution programs should be guided by considerations of security, return on investment and flexibility. Those responsible for investment decisions should keep in mind that the assets of the fund belong to the class, and are being administered for the benefit of the

members of the class. Adequate bonding, auditing and insurance will be required.

3. Administrative Budgets

The payment program and the class assistance foundation will be operated as efficiently and economically as possible. Administrative costs must be minimized so that members of the class receive the largest possible benefits of the settlement.

Most payment program expenses will be incurred in the early years when the largest influx of application forms will occur. The cost of administering the payment program should dwindle in the late years of the program.

In contrast, the cost of administering the class assistance foundation will be relatively constant throughout the entire 25-years of its operation under the distribution plan. Control of the foundation's administrative expenses, like

other aspects of administering the foundation, will be the responsibility of the board of directors and the executive director.

Because of uncertainties associated with both distribution programs, it is difficult to project the cost of administering them. Until more is known about the claims that will be submitted to the payment program, the size of the tasks that will have to be performed cannot be projected with precision. In addition, many tasks would be contracted to outside service providers. These services would be subject to a competitive bid process. See *supra* Part IV.H.1. The foundation's administrative expenses will depend on what the board of directors determines the foundation should do. At least some of the services it funds might also be subject to competitive bidding. See *supra* Part V.E.2.a. The Special Master's Report

provides some tentative and preliminary cost projections. See Special Master's Report, pp. 619-23.

4. Audits

Throughout the life of the distribution programs, one or more accounting firms will conduct an independent audit at least annually of all aspects of the programs, including investment of the settlement fund, operation of the payment program, and operation of the class assistance foundation. The board of directors will select the accounting firm that will conduct future independent audits of the foundation. The court may require further independent audits of the foundation by a court-appointed accounting firm.

Audits will include a review of financial transactions to determine whether the financial reports fairly represent the current financial position of the programs and changes in that

financial position. They also will include an analysis of whether the distribution programs are operating in an efficient, economical and effective manner. Reviews will encompass the operations of the major contractors and the investment program, as well as the distribution programs. The reports will be submitted to the court and will be docketed as part of the court record, where they will be available to class members and to the public.

*C. Role of the Special Master and
Implementation Schedules*

The Special Master will have an important role in readying the distribution plan for implementation. Accordingly, Special Master Kenneth R. Feinberg's appointment as Special Master will continue on a contract basis until such time as the distribution plan has been implemented and is fully operational. Among other things, the Special Master

will oversee the planning and development of the payment program. He will consult with the advisory group of Vietnam veterans that will be appointed by the court. See *supra* Part IV.H.8. The Special Master also will establish the class assistance foundation and seek tax-exempt status for the foundation. See *supra* Part V.B.1. The foundation board of directors will be consulted.

Establishing an implementation schedule requires a balance to be struck between competing objectives. One of the advantages of a settlement in any lawsuit is that plaintiffs can receive funds sooner and avoid the uncertainty and lengthy delays involved in litigating the case to a final judgment. Development and implementation of a plan for distribution of a settlement fund thus should proceed as expeditiously as possible, so that the plaintiffs can begin to benefit from the

settlement. See *In re "Agent Orange" Product-Liability Litigation*, 597 F.Supp. 740, 858 (EDNY 1984).

Formulation of a fair and equitable distribution plan in this case has required careful and extended consideration of numerous distribution proposals and resolution of many complex and difficult issues. Haste in establishing the \$200 million programs called for in the court's distribution plan could be expensive to the class, wasting funds that could otherwise be expended for the benefit of class members. Prompt but prudent action is the wisest course in making the payment program and class assistance foundation operational. The desirability of distributing the benefits of the settlement to the class as soon as possible cannot be allowed to obscure the equally important objective of operating the distribution programs in

an efficient, professional and cost-effective manner.

The Special Master recommended that the payment program and class assistance foundation be made operational within a reasonably short period of time - a year from the date of this opinion, if possible. Special Master's Report, p. 242. This target date is desirable and acceptable. All permissible preliminary steps toward making the distribution programs operational will be undertaken while appeals are pending so that delay in implementation is minimized. It is important to recognize, however, that because of the appellate process a definitive time schedule for implementation and the beginning of distribution operations cannot be fixed.

With these limitations in mind, the following schedule will govern implementation of the distribution plan.

It is based on sample schedules prepared by the Special Master. See Special Master's Report, pp. 591-98. The schedule incorporates the dual objectives of operating the settlement programs efficiently and professionally while distributing settlement benefits as expeditiously as possible. The dates used are not precise deadlines. They are set forth to demonstrate the tasks that need to be accomplished and to provide estimates of how long it should take to complete them.

1. Payment Program

The Special Master will immediately begin to assemble a detailed bid request to be sent to prospective contractors desiring to provide claim processing services. By June 30, 1985, the court will appoint a veterans advisory group. See *supra* Part IV.H.8. By August 1, 1985, a claim processor or claims processors

should be selected. See *supra* Part IV.H.1.

From August 1, 1985 through October 1, 1985, application forms and instructions should be prepared, approved by the court, and printed. An assistance manual should be prepared and disseminated to state veterans agencies and to veterans organizations. See *supra* Parts IV.H.2., IV.H.3. and VII.A.3.

By October 1, 1985, application forms will begin to be sent to claimants. Claimants will have 60 days from the date of mailing to complete and return the forms. Completed forms will be returned by January 1, 1986. See *supra* Parts IV.H.3. and VII.A.3. From November 1, 1985 through March 1, 1986, the returned claims will be analyzed and additional information needed in processing any of them obtained. Eligibility criteria and payment levels will be evaluated. By March 31, 1986, a report should be submitted to the court on

final eligibility proposals and projected payment levels. By April 15, 1986, the court should approve final eligibility and disability criteria and first payment levels. See *supra* Part IV.H.5.

Beginning on April 15, 1986, claims should be processed based on approved eligibility and disability criteria. By May 1, 1986, assuming that implementation has proceeded on schedule and all appeals have been completed, the first payments will begin going to qualified applicants. See *supra* Part IV.H.4.

2. Class Assistance Foundation

By June 20, 1985, the court will appoint a search committee comprised of prospective members of the foundation board of directors. The committee will seek and evaluate candidates for executive director of the foundation. See *supra* Part V.B.3.

By August 1, 1985, the Special Master should establish the foundation, and the

court should appoint the board of directors and the executive director. See *supra* Part V.B. The board should submit a comprehensive plan for foundation operations to the court by April 1, 1986. Payments by the foundation can begin by May 1, 1986 if all appeals have been completed.

3. Annual Operating Schedules

Once implemented, the distribution programs will operate on regular annual schedules. Sample schedules are set out in the Special Master's Report. See Special Master's Report, pp. 594, 597-98.

VIII. CONCLUSION

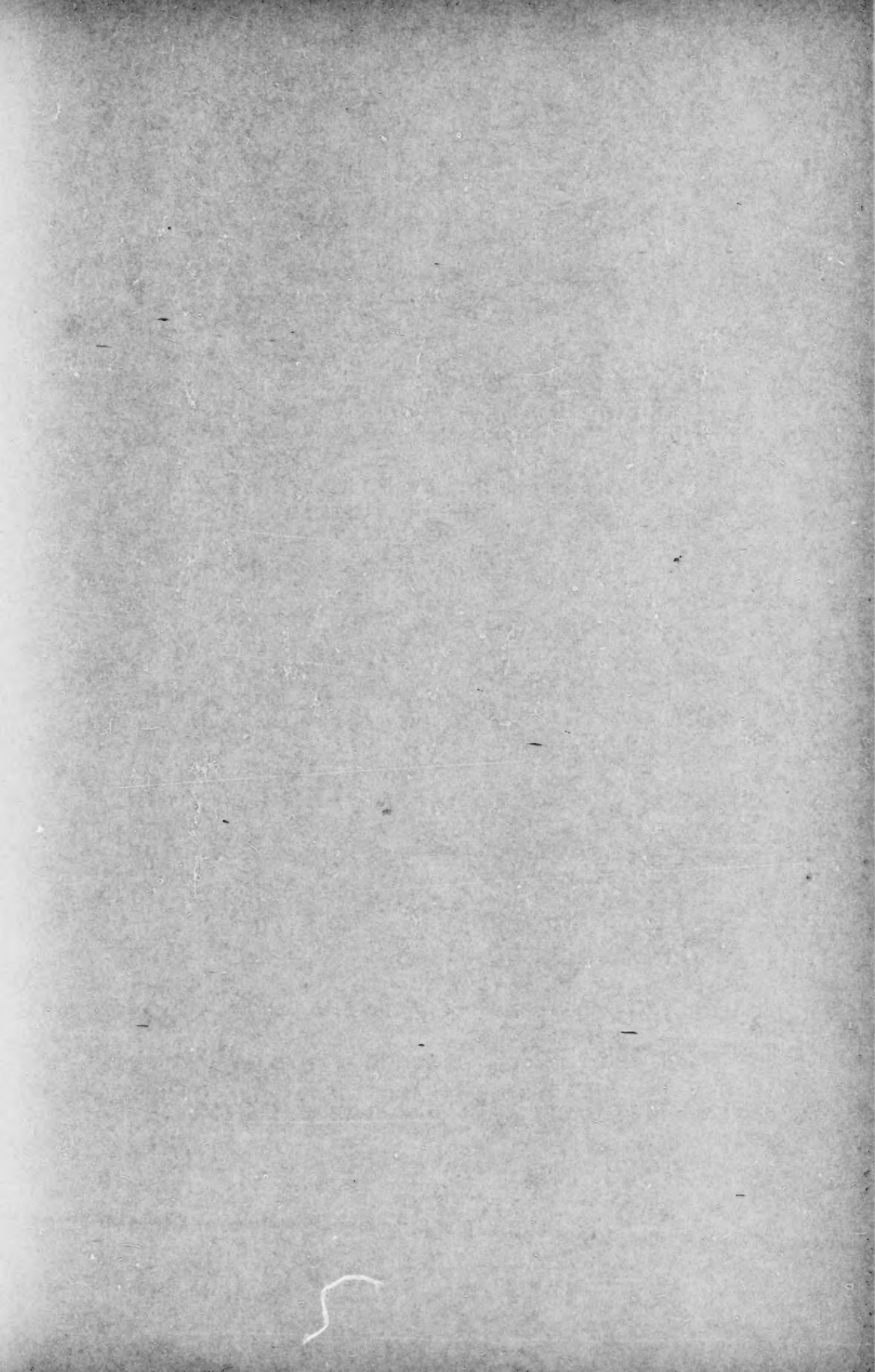
The settlement fund will be distributed according to the plan set forth in this opinion. Distribution of the fund is stayed pending completion of appeals. No cash payments to individual claimants can be made and no services can be funded until the appellate process has concluded.

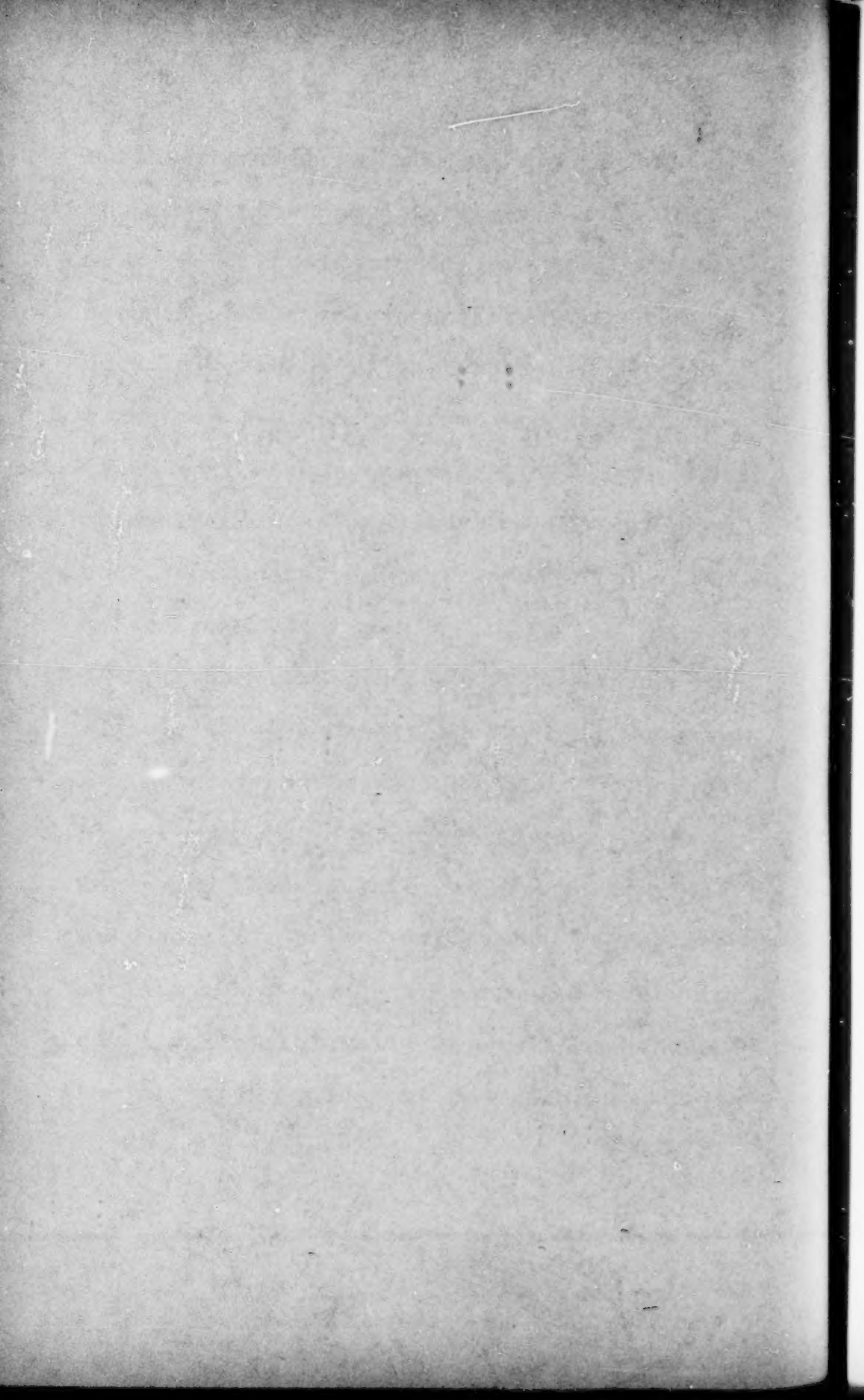
During the interim, subject to control by the court, the Special Master will solicit bids from contractors for the payment program, enter into contracts conditioned upon the outcome of the appellate process, establish the foundation and apply for tax-exempt status, develop and mail out payment applications, analyze the returned data, and adjust payment and eligibility criteria.

Necessary and incidental expenses of administering the settlement fund in these and other respects will be paid on court order out of the settlement fund. Contracts entered into, to the extent of performance prior to any appellate decision, and payments made pursuant to court approval, shall be valid whatever the ultimate outcome of any appeals.

SO

ORDERED.





APPENDIX II

(818 F.2d 179)

In re "AGENT ORANGE" PRODUCT
LIABILITY LITIGATION
MDL NO. 381.

Nos. 328, 306 and 329-331. Dockets
86-3039, 86-3042, 86-6171, 86-6173
and 86-6174.

United States Court of Appeals,
Second Circuit.

Argued Oct. 1, 1986.

Decided April 21, 1987.

Before VAN GRAAFEILAND, WINTER,
and MINER, Circuit Judges.

WINTER, Circuit Judge.

This opinion addresses challenges by the Plaintiffs' Management Committee ("PMC") and by certain plaintiffs represented by Victor Yannacone to Chief Judge Weinstein's adoption of a plan for the distribution of the fund established as a result of the class settlement with the defendant chemical companies. See *In re "Agent Orange" Product Liability*

Litigation, 611 F.Supp. 1396 (EDNY 1985) ("*Distribution Opinion*"). Because no party to this litigation is adverse to the PMC, we requested that Special Master Kenneth Feinberg defend the district court's distribution order essentially in the role of an *amicus curiae*. A detailed discussion of the development and selection of the distribution plan appears in the first of this series of opinions, 818 F.2d 145 familiarity with which is assumed.

Certain plaintiffs represented by Mr. Yannacone have also filed a petition for writ of mandamus or prohibition to have the PMC removed as class counsel. That issue is also addressed herein.

1. *The Timeliness of the Pending Appeals*

A party seeking to appeal a final decision of a district court in any case where, as here, the United States is a

party must file a notice of appeal within 60 days after entry of the decision. Fed.R.App.P. 4(a)(1). The notice of appeal filed by Mr. Yannacone is concededly untimely. That appeal is therefore dismissed.

The Special Master argues that the PMC's pending appeal is also untimely because it was noticed on August 19, 1986, more than 60 days after the distribution plan was adopted on May 28, 1985. However, important aspects of the distribution plan remained to be decided as of the earlier date, including, for example, the means of compensating veterans from Australia and New Zealand, 611 F.Supp. at 1443-45; the criteria for establishing a claimant's exposure to Agent Orange, *id.* at 1417; and the entities that were to implement and administer the individual payment program, *id.* at 1427. Moreover, Chief

Judge Weinstein apparently did not view the entire distribution plan as final until July 31, 1986, when he entered an order pursuant to Fed.R.Civ.P. 54(b) designed to "constitute a final judgment upon this Court's Distribution Opinion of May 28, 1985.

We do not believe that appellants were faced with the choice of appealing from the May 28 order or not at all. Whether that order was appealable is of great doubt. It was not a collateral order that "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). Unlike such a collateral order, the May 28 order could be effectively reviewed as part of the final judgment. *Id.* See also *Coopers & Lybrand v.*

Livesay, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171-72, 94 S.Ct. 2140, 2149-50, 40 L.Ed. 2d 732 (1974).

Even if the May 28 order was appealable under *Cohen*, there is still no reason to bar an appeal from the July 31 order, which was clearly intended by the district court to be final. See 15 C.Wright, A.Miller & E.Cooper, *Federal Practice & Procedure*, sec. 3909, at 452 n.38 (1976) ("There is often little reason to deny review on appeal from a clearly final judgment on the theory that an earlier order that did not terminate the entire proceeding was nonetheless so final as to have been appealable. Doctrines designed to facilitate intermediate appeals to avoid hardship often do not serve any corresponding interest in protecting

opposing parties and the courts against delayed appeals."). *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299 (1950), is a rare case in which the Supreme Court dismissed an appeal on the ground that it should have been filed prior to the entry of final judgment. The instant case is distinguishable from *Dickinson* in at least two respects, however. First, the order that would have been appealable in *Dickinson* dismissed all claims raised by the appellant. The Court thus noted that the appellant's interests "could not possibly have been affected" by any action that remained to be taken by the district court. *Id.* at 515, 70 S.Ct. at 325. In contrast, the plaintiffs here continued to have an active interest in the litigation after the May 28 decision. Second, the Court recognized in *Dickinson* that the case

had arisen before the adoption of Rule 54(b), a provision with the "obvious purpose" of "reduc[ing] as far as possible the uncertainty and the hazard assumed by a litigant who either does nor does not appeal from a judgment of the character we have here." *Id.* at 512, 70 S.Ct. at 324. the Court therefore expressly refused to "try to lay down rules to embrace any case but this." *Id.*

Accordingly, we conclude the PMC's appeal from the district court's distribution plan was timely filed. We therefore need not consider the PMC's petition for a writ of mandamus, which raises the same issues.

2. General Principles

District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members ... equitably." *Beecher v. Able*,

575 F.2d 1010, 1016 (2 Cir. 1978). In reviewing allocations of class settlements, therefore, we will disturb the scheme adopted by the district court only upon a showing of an abuse of discretion.

In the present case, a relatively modest settlement fund must be allocated equitably among a large and diverse group of claimants. There are 240,00 claimants dispersed throughout the United States, Australia, and New Zealand. they suffer from an immense variety of ailments and have different medical and financial needs. Having pursued a number of often inconsistent goals in this litigation, they are as sharply divided over the distribution of the settlement fund as they are over its adequacy. The PMC seeks what it regards as a conventional scheme for "tort-based" recovery by individuals;

Mr. Yannacone's clients want the fund devoted largely to establishing a foundation; the district court adopted a compensation based scheme to distribute the bulk of the fund with the remainder to be used to establish a foundation. See P. Schuck, *Agent Orange on Trial* 211-13, 220 (1986).

The district court was not bound to choose among only those plans offered by class members who spoke out. Rather, it had to "exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference," *In re Traffic Executive Association - Eastern Railroads*, 627 F.2d 631, 634 (2 Cir. 1980), as well as to protect the interests of more vocal members of the class. The district judge therefore had discretion to adopt whatever distribution plan he determined to be in

the best interests of the class as a whole notwithstanding the objections of class counsel, see, e.g., *Distribution Opinion*, 611 F.Supp. at 1409 (criticizing distribution plan proposed by PMC on ground that "too great a share of the fund would go to lawyers and medical experts"); *Plummer v. Chemical Bank*, 668 F.2d 654, 659 (2 Cir.1982) (district courts cannot rely solely on "the arguments and recommendations of counsel" in evaluating propriety of class settlements), or of a large number of class members. See *TBK Partners, Ltd v. Western Union Corp.*, 675 F.2d 456, 462 (2 Cir. 1982) (holding in shareholders' derivative suit that even "majority opposition ... cannot serve as an automatic bar to a settlement that a district judge after weighing all the strengths and weaknesses of a case and the risks of litigation, determines to

be manifestly reasonable"). See also *Cotton v. Hinton*, 559 F.2d 1326 (5 Cir. 1977) (approving settlement over objections of counsel purporting to represent almost 50 percent of class); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3 Cir.) (approving settlement over objections of almost 20 percent of class), *cert denied*, 419 U.S. 900, 95 S.Ct. 184, 42 L.Ed.2d 146 (1974).

3. Choice of Law

In adopting a distribution plan that departed from traditional tort principles by not requiring "a particularized showing of individual causation and injuries," 611 F.Supp. at 1402, the district court held that such a plan would be consistent with "the consensus of state law," *id.* at 1403, that figured in its certification of a class action. In *re "Agent Orange" Product Liability Litigation*, 100 FRD

718 (EDNY 1983).

In the mandamus proceeding, we expressed "considerable skepticism" as to whether such a consensus would emerge among the states with respect to the legal rules applicable to the plaintiffs' claims. In *re Diamond Shamrock Chemicals Co.*, 725 F.2d 858, 861 (2 Cir.), cert denied, 465 U.S. 1067, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984). In the first of this series of opinions we have stated that the district court's conclusion as to the national consensus was to be praised more for its analysis than for its utility as a predictor of what various courts would do.

However, our disagreement with use of the national consensus in certifying a class does not foreclose its use as a method of establishing criteria for distributina class settlement fund. As

another Court of Appeals has observed in the class action context, "the allocation of an inadequate fund among competing complainants is a traditional equitable function, using 'equity' to denote not a particular type of remedy, procedure, or jurisdiction but a mode of judgment based on broad ethical principles rather than narrow rules." *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7 Cir. 1982) (citation omitted) (citing *Zients v. LaMorte*, 459 F.2d 628, 630 (2 Cir. 1972)). Use of a single national standard, regardless of what law various courts might have chosen in Agent Orange cases, is a permissible method of disbursing the fund. An individual claimant state-by-state approach would seriously deplete the portion of the fund going directly to veterans by diverting a substantial amount to lawyers and to the

adjudicators necessary to implement the PMC's complex scheme. The diversion might be so great as to reduce benefits for all claimants, including those who would be subject to the most favorable state laws. We thus agree with the approach of the district court on this question, although on a different rationale.

*4. Payments for Death or Disability
of Exposed Veterans*

The PMC contends that the district court abused its discretion in compensating individual disabled veterans without requiring "a particularized showing of individual causation and injuries." 611 F.Supp. at 1402. The PMC argues that a portion of the settlement fund will thereby be distributed to undeserving claimants whose injuries were not caused by Agent Orange. Even if that outcome is the case, we do not believe that it is a grounds for altering the distribution scheme.

Chief Judge Weinstein did not deem necessary proof that a veteran's death or disability resulted from exposure to Agent Orange¹ because he found the available evidence insufficient to establish which non-traumatic injuries could have been caused by Agent Orange and which could have been caused by Agent Orange and which not. In other words, as between exposed veterans suffering from diseases for which the PMC would provide compensation and the PMC would provide compensation and exposed veterans suffering from other nontraumatic diseases, the district court concluded that the former had no stronger claim for benefits than the latter because "causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability." 611 F.Supp. at 1409.

Chief Judge Weinstein did not abuse his discretion in adopting a distribution plan that reflected this conclusion. He was not obligated to adopt a plan that conformed to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis. Further, he could take into account the very substantial countervailing evidence that Agent Orange was not harmful to any personnel in Vietnam. See *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 782-95 (E.D.N.Y. 1984) ("Settlement Opinion") (reviewing scientific data on effects of Agent Orange and concluding that "all that can be said is that persuasive evidence of causality has not been produced"). He could also consider the substantial difficulty of proving that any particular plaintiff was injured by Agent Orange in making an

equitable allocation of the limited settlement fund. See *Curtiss-Wright Corp.*, 687 F.2d at 174-75 (equitable allocation of a class action settlement fund may be accomplished over party's objection without "resolv[ing] trial-type issues of liability" based on district court's independent "weigh[ing of] the relative deservedness" of claimants). Moreover, he was correct in seeking a distribution scheme governed by criteria that are relatively easy and inexpensive to apply.

Furthermore, as became clear at oral argument, the PMC itself would not longer require proof that a veteran was actually exposed to Agent Orange in order to qualify a claimant for benefits under its distribution plan. Thus, servicepersons who spent their entire tour of duty far away from sprayed areas could receive payments under the PMC

plan merely be developing any of the 24 medical conditions that the PMC claims are associated with Agent Orange. In contrast, the district court's plan would require some evidence of exposure.² Even if the district court's distribution plan is overbroad with regard to ailments, that fact hardly renders it less desirable than the PMC's plan, which is clearly overbroad with regard to exposure.

We further note that the distribution plan adopted by the district court does not entirely disregard traditional tort principles of causation. For example, it provides payments only to veterans who have become disabled from non-traumatic, non-accidental, non-self-inflicted causes and to the survivors of veterans who have died from such causes. Consequently, a veteran who died or became disabled as a result of an auto

collision, a gunshot wound, or a narcotic overdose, all causes clearly unrelated to Agent Orange exposure, would have no claim to payments from the settlement fund.

In sum, given the inconclusive state of the scientific evidence as to what injuries, if any, were caused by Agent Orange, the district court did not abuse its discretion in holding that all exposed veterans who have suffered nontraumatic death or disability have stated "colorable legal claims against defendants ... [sufficient] to allow the to share in the settlement fund." *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5 Cir. 1982), quoted in *Distribution Opinion*, 611 F.Supp. at 1411.

We emphasize that the district court is free to alter the distribution plan in the future to simplify it even more

or to clarify standards as concrete issues arise. We also ask the district court to review its procedures for establishing exposure to Agent Orange in light of Attachments 2 and 3 to the PMC's reply brief and recent news reports concerning the possible discovery of a biological "fingerprint" left in veterans' blood by dioxin. See Researchers Report Finding Teltale sign of Agent Orange, N.Y. Times, Sept. 18, 1986, sec. A at 28, col. 3 (late city final ed.).

5. Class Assistance Programs

We turn to the district court's proposal to establish "a class assistance foundation ... to fund projects and services that will benefit the entire class." 611 F.Supp. at 1432. the PMC contends that use of the settlement fund for class assistance programs would contravene the decisions

of this court in *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005 (2 Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (remedy proposed before finding of liability in order to make class manageable; rejected because it benefitted future odd-lot investors rather than past investors who had suffered loss, and *Van Gemert v. Boeing Co.*, 533 F.2d 812 (2 Cir. 1977) (rejecting proposal that would have permitted unclaimed portion of damage award to be paid to class members who had already been made whole).

We do not believe that the district court was necessarily foreclosed by *Eisen* and *Van Gemert* from using a portion of the settlement fund to provide programs for the class as a whole. The instant case is, of course, distinguishable from *Eisen* and *Van Gemert* in several

important respects.

First, the class that will benefit from the district court's distribution plan is essentially equivalent to the class that claims injury from Agent Orange. That was not the case in either *Eisen* or *Van Gemert*. In *Eisen*, the proposed recovery scheme would primarily have benefitted not the class of persons who claimed injury from prior odd-lot transactions but instead a class of persons who would engage in such transactions in the future. In *Van Gemert*, the proposal at issue would have distributed the unclaimed portion of a damage award to class members who had already recovered their losses in full, a group the court characterized as a "next best class." 553 F.2d at 815. Hence, the distribution plan adopted by Chief Judge Weinstein simply lacks the sort of "fluidity" between the class claiming

injury and the class receiving recovery that existed in *Eisen* and *Van Gemert*.

Second, we were particularly concerned in *Eisen* that the availability of "fluid class recovery" would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not. The damages to the average class member in *Eisen* were estimated at no more than \$3.90, see 479 F.2d at 1010, and, as counsel for the named plaintiff conceded, "[i]f each [member] had to present his own personal claim for damages, the class, indeed, would not be manageable." *Id.* at 1017. We foresaw that such an unwarranted relaxation of the manageability requirements would have induced plaintiffs to pursue "doubtful" class claims for "astronomical amounts" and thereby "generate ... leverage and pressure on

defendants to settle." *Id.* at 1019. However, the instant case, unlike *Eisen*, was maintainable as a class action regardless of the form of recovery available to the plaintiff class. Accordingly, our concern in *Eisen* that the availability of a particular form of recovery would vastly enlarge the number of class actions in the federal courts is not present in the instant case.

Finally, the instant case, unlike *Eisen* and *Van Gemert*, arises out of a pretrial settlement. As the Supreme Court has recognized, a district court may "provide[] broader relief [in an action that is resolved before trial] than the court could have awarded after a trial." *Local Number 93, International Association of Firefighters v. City of Cleveland*, 106 S.Ct. 3063, 3077, 92 L.Ed.2d 405 (1986). Indeed, we have previously recognized that some

"fluidity" is permissible in the distribution of settlement proceeds. See *Beecher v. Able*, 575 F.2d at 1016 n. 3; *West Virginia v. Chas. Pfizer & Co., Inc.*, 314 F.Supp. 710, 728 (SDNY 1970), *aff'd*, 440 U.S. 1079 (2 Cir.), *cert denied*, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971).

We thus conclude that a district court may, in order to maximize "the beneficial impact of the settlement fund on the needs of the class," 611 F.Supp. at 1431, set aside a portion of the settlement proceeds for programs designed to assist the class. However, we believe that the district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds. The district court failed to do so in the instant case. Instead, it provided that

the board of directors of a class assistance foundation would control, *inter alia*, "investment and budget decisions, specific funding priorities, ... [and] the actual grant awards," *id.* at 1435, and that the court would retain only "[a] comparatively modest supervisory role" in such decisionmaking. *Id.* at 1436.

We are unwilling for several reasons to permit the distribution of any settlement proceeds to a largely independent foundation. First, while a district court is permitted broad supervisory authority over the distribution of a class settlement, see *Beecher v. Able*, 575 F.2d at 1016, there is no principle of law authorizing such a broad delegation of judicial authority to private parties. We perceive no assurance that the "self-governing and self-perpetuating" board of directors of

the class assistance foundation, or any other such body that might be devised by the court, will possess the independent, disinterested judgment required to allocate limited funds to benefit the class as a whole. One of the district court's prime functions in distributing such a fund is to protect the less vocal and less activist members of the class. The proposed foundation is not well designed to perform that function. Moreover, given the very evident discord among various veterans as to the use of the settlement fund, we see great hazards in transferring that discord to a foundation having permanent control over portions of that fund. There is a great danger that the fund would be expended in ways that generate more controversy than benefits and would create even more frustration among a group already frustrated enough by

perceived political and legal setbacks. However unique it may be, this is an action for personal injuries, and we believe that only direct judicial supervision can assure that the settlement fund is expended for appropriate purposes.

We acknowledge the strong sentiment among some veterans for the creation of such a foundation. We also note, however, their great expectations for the foundation are similar to the expectations that prompted this class action litigation. Those latter expectations were frustrated when confronted with the reality of legal proceedings. Great expectations underlying the foundation proposal still exist because the concrete tasks to be undertaken by it remain unclear, and the reality of hard and controversial choices concerning use of the fund has

not yet been confronted.

Moreover, we are concerned that the broad mandate given the class assistance foundation, which must remain an arm of the court however loosely connected, would permit settlement proceeds to be expended on activities inconsistent with the judicial function. For example, activities to "help class member veterans better obtain and utilize VA services" and to "increase public awareness of the problems of the class," *id.* at 1440, might include political advocacy. We do not believe that the proceeds of a court-administered settlement ought to be used for such a purpose.

Finally, we are concerned that, even given the expressed intention to allow the foundation great latitude, the district court and this court would repeatedly be asked to intervene in

foundation decisions alleged not to benefit the class. When such claims are made, they call for greater scrutiny than is contemplated by the district court's exercise of only a "modest supervisory role." In addition, endless legal argument over the disbursement of the settlement fund would simply prolong the suffering and frustrations of the class.

We explicitly note, however, that the district court may in the exercise of its discretion and after consultation with veterans' groups undertake to use portions of the fund for class assistance programs that are consistent with the nature of the underlying action and with the judicial function. Accordingly, the district court on remand may designate in detail such programs and provide for their supervision. A reserve fund for as yet

undefined programs may be established. Alternatively, the court may reallocate any or all of the funds earmarked for the class assistance foundation to augment the awards to individual class members. The court may choose either to increase the awards to disabled veterans and the survivors of deceased veterans or to provide awards to other class members who have suffered less than total disability.

*6. Yannacone Petition for Writ of
Mandamus/Prohibition*

The petition for writ of mandamus or prohibition filed by Mr. Yannacone seeks the removal of the PMC as lead counsel. Mr. Yannacone contends that a "conflict of interest" exists between the PMC and the plaintiff class, as evidenced by the differences between the distribution plan submitted by the PMC and the plan submitted by Mr. Yannacone. He also

argues that the plaintiffs are entitled to "a rasonable opportunity to be heard through counsel of their own choosing who can and will speak independently on their behalf." The petition is frivolous.

We note that Mr. Yannacone was among the attorneys who first sought class certification and that he served for some time as the lead counsel for the class. Nevertheless, his present petition reveals a fundamental misunderstanding of the nature of a class action. A plaintiff who joins in a class action, as many plaintiffs did through Mr. Yannacone, gives up his or her right to control the litigation in return for the economies of scale available under Fed.R.Civ.P. 23. In the related context of a shareholder's derivative suit, we have rejected any notion that "each individual plaintiff and lawyer must be

permitted to do what he pleases in litigation as complex as this, and can behave in total disregard of the interest of other litigants and of the class. *Farber v. Riker-Maxson Corp.*, 442 F.2d 457, 459 (2 Cir.1971)(per curiam).

The selection of lead counsel for the plaintiff class is left to the discretion of the district court "guided by the best interests of [the class], not the entrepreneurial initiative of the named plaintiffs' counsel." *Cullen v. New York State Civil Service Commission*, 566 F.2d 846, 849 (2 Cir. 1977). "Unless there are exceptional circumstances, ... the exercise of discretion should be left untouched by the appellate court." *Id.* See also *Height Watchers of Philadelphia, Inc. v. Height Watchers International, Inc.*, 45 F.2d 770, 775 (2 Cir.1972)("we do not - indeed may not - issue mandamus with respect to orders

resting in the district court's discretion, save in most extraordinary circumstances'") (quoting *Donlon Industries Inc. v. Forte*, 402 F.2d 935, 937 (2 Cir. 1968)).

Mr. Yannacone has failed even to suggest, much less establish, any "exceptional circumstances" that might warrant removal of the PMC as lead counsel. Indeed, he has suggested nothing more than a difference of opinion between the PMC and himself with respect to the appropriate distribution of the settlement fund. Moreover, these differences were fully aired before the district court, which thoroughly evaluated the merits of each plan in the course of its distribution opinion. See 611 F.Supp. at 1403-10.

Finally, even if we were to order the removal of the PMC as lead counsel, we have no reason whatsoever to expect the

district court to appoint Mr. Yannacone to take its place. We have even less than no reason to expect the district court to abandon its own distribution plan in favor of the plan proposed by Mr. Yannacone. Accordingly, the petition is denied.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion.

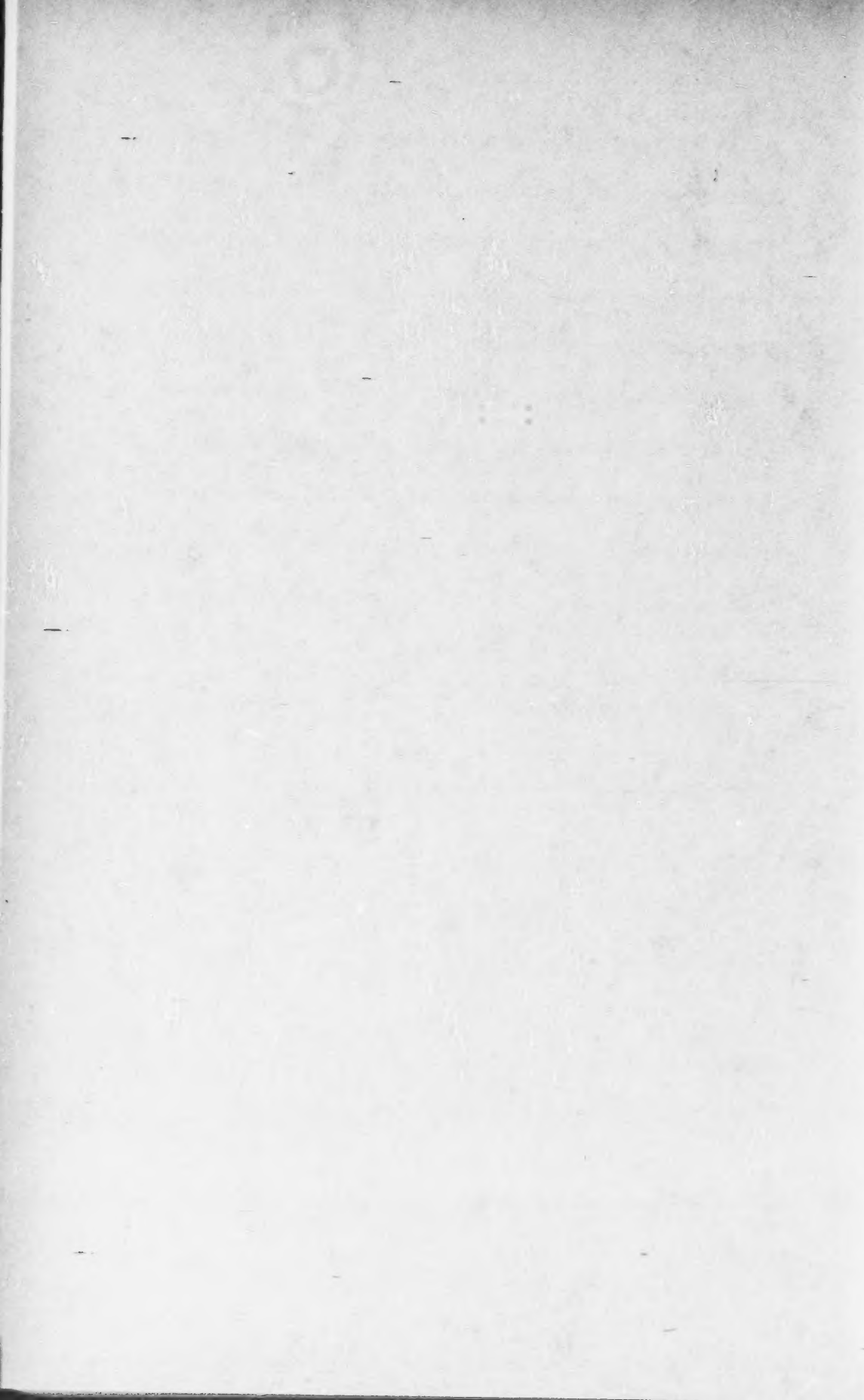
Footnotes:

1. The court adopted the Social Security Act's definition of "disability", namely an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. sec. 423(d)(1)(A) (1982). The court provided that "[a]ny veteran claimant certified as disabled by the Social Security Administration will be considered disabled for purposes of the payment program, unless the disability was predominantly caused by a traumatic, accidental or self-inflicted injury." 611 F.Supp. at 1413. A claimant who has not been found disabled by the Social Security Administration may still

qualify for payments by submitting satisfactory medical evidence to the disbursing authority; in such cases, "the payment program will take into account, as evidence, a Social Security determination that the veteran is no disabled, or certifications of disability from other entities such as the Veterans Administration or private insurers." *Id.*

2. The plan would require a claimant to make "[s]ome substantial showing of exposure" to Agent Orange, 611 F.Supp. at 1415, by demonstrating that he held a job involving direct handling or application of Agent Orange," *id.* at 1416, or that he "was present in a sprayed area when the spraying occurred" or in or near such an area within some specified period thereafter, *Id.* at 1417. the court would rely primarily on the HERBS tape, a computerized record of

herbicide dissemination missions in Vietnam, to determine the exposure of ground troops to Agent Orange. However, "[b]ecause the HERBS tape doesnot account for all possible exposures," veterans who could not establish exposure on the basis of the HERBS tape would be able to present alternative evidence of exposure to "an independent board of review." *Id.*



APPENDIX *III*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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IN RE: "AGENT ORANGE"]
PRODUCTS LIABILITY] MDL NO. 381
LITIGATION] (ALL CASES)

PLAINTIFF'S AMENDED MOTION TO THE COURT
TO RECONSIDER FINDINGS OF JUDGE PRATT IN
PRE-TRIAL ORDER NO. 51, DATED MAY 20,
1983, TO THE EFFECT THAT ELEMENTS ONE
AND TWO OF THE GOVERNMENT CONTRACTORS
DEFENSE SHOULD BE FOUND, UNDER RULE
56(d), IN FAVOR OF THE DEFENDANTS; THIS
RELIEF IS SOUGHT WITH RESPECT TO THIS
COURT'S GENERAL POWER TO RECONSIDER
PRIOR MATTERS WHICH ARE NOT CONTAINED IN
A FINAL ORDER, IT BEING THE POSITION OF
THE COURT THAT NO "FINAL" ORDER OR
JUDGMENT WAS ENTERED WITH RESPECT TO
SUCH FINDINGS, AND/OR RELIEF IS SOUGHT
UNDER RULE 60(b), F.R.C.P., FOR MODIFI-
CATION OF PRIOR ORDERS OF THE COURT

COMES NOW the Plaintiffs and, with
respect to the findings of Judge Pratt
in Pre-Trial Order No. 51, dated May 20,
1983, that elements one and two of the
Government Contractors Defense would be
determined in favor of the Defendants

pursuant to Rule 56(d) of the Federal Rules of Civil Procedure, would respectfully urge the Court to utilize its general power to reconsider and modify all prior, non-final orders of the Court, and/or should this Court deem such order to be in any respect "final", then to modify same pursuant to Rule 60(b), F.R.C.P., and for such motion would respectfully show unto the Court:

I.

.....

II.

EXAMPLES OF FACTUAL EVIDENCE BEARING
UPON ELEMENTS ONE AND TWO
OF THE GOVERNMENT CONTRACTORS DEFENSE

This Court has had the documents and testimony with respect to the Government Contractors Defense summarized, discussed and rediscussed on so many occasions that Plaintiffs will not burden this Court with a detailed

discussion of the evidence. Suffice it to say that, at least recently, there has been a substantial amount of evidence developed with respect to elements one and two, indicating quite clearly that there are at least fact issues about those elements. Some examples follow:

1. As we pointed out in our "Supplemental Reformulation" brief, at pp. 32-34, a sub-issue of the first element (whether or not the Government "established" and/or "approved" the specifications in question) is whether or not the specifications which the Government established imposed "minimal and very general requirements" with respect to the preparation of the specifications, the manufacturing of the products and the delivery of the product. See McKay v. Rockwell

International Corp., 704 F.2d 444 (9th Cir. 1983), and Merritt, Chapman, et al v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961). There is substantial evidence that it was the intention of the Government, and its conduct bears this out, that the Agent Orange program would impose only minimal and general requirements upon the Defendants. For example, at the first "Defoliation conference", held July 29-30, 1963 at the United States Army Biological Laboratories at Ft. Detrick, Mr. Albert E. Hayward, Chief of the Program Coordination Office, stated in a presentation for which official notes exist:

In a very real sense, this program is defoliation is a little bit unique with respect to the usual military-industrial collaboration. Ordinarily, in military R&D we have a military concept that leads to the statement of a military requirement,

technical characteristics, performance specifications, and other strictly delimited aspects. In this program we do not have rigidly specified characteristics. I have stated some of the broad requirements that a successful defoliating chemical should have, but within this general framework we will accept and use materials that will do a job for us. In a few years, it may be that we will come up with more definite specifications but at the moment we simply solicit the assistance of you gentlemen in finding materials that can be used successfully within the reasonably broad and general guidelines that General Delmore has stated and that I have repeated. (Emphasis added).

2. In addition, there is extensive evidence that the specifications issued by the Government had really been "established" by the Defendants, particularly the Monsanto Defendant, and that the Government exercised only minimal control over the formulation and manufacturing of the Agent Orange products. In other words, it is clear from the evidence that the Government

acquired the specifications for the Agent Orange product from "off-the-shelf" products of the Defendants. The following evidence indicates this:

a. Cecil Russell was the Director of Quality Control with Monsanto. He had the job of helping the government prepare the specifications for Agent Orange. In his deposition, he acknowledged that he had written a letter stating: "I wrote the existing military specifications on N-Butyl D and T and Orange 1." Although he later retreated from that position, when pressed upon cross-examination he admitted that, at the least, he "helped write the specifications."

b. As further corroboration of the foregoing, a memo dated February 22, 1963 was signed by Mr. Russell which had attached to it "ester Specifications for

United States Army Biological Laboratory." In the memo, Mr. Russell states that at the initial meeting with the military Mr. Bourland of the Government wanted know whether or not Russell would work with a Mr. Pearson on the specifications.

c. In another communication, dated February 8, 1963, Mr. Russell stated: "I was able to completely satisfy Mr. Bourland, who wanted me to first suggest a specification and an analytical method on the next blend which they will be receiving, and then work with their Mr. Pearson on writing the specifications covering this material. Mr. Pearson will be here 2-18-63."

Mr. Russell confirmed what Plaintiffs suspected and had been advised from other sources all along: the chemical companies actually prepared

the specifications for Agent Orange - not the Government. The importance of the Monsanto witnesses' testimony, such as Mr. Russell's, is that Monsanto was one of the first to contract with the Government to provide Agent Purple and Agent Orange. The obvious consequence of Monsanto's furnishing the specifications for those herbicides was that the Government simply took the specifications furnished by Monsanto and denominated them, Mil-H-51147 and Mil-H-51148. Those specifications were used in the contracts with all of the manufacturing Defendants.

It is further important for the Court to realize that, although Mr. Russell's deposition was taken at about the same time Judge Pratt handed down Pre-Trial Order No. 51, Judge Pratt had no knowledge of it when he entered the

Order. Therefore, there can be no question but that Russell's deposition constitutes new or after-acquired evidence.

The facts now make it clear that the United States Government simply used the Defendant chemical companies' specifications for products involving 2,4-D and 2,4,5-T. It is now clear that the Government made no effort to analyze such specifications or to test formulations for hazards, risks or efficacy. Rather, it relied upon the Defendant chemical companies to have done such testing, as well as their implied warranties that the products were safe.

The evidence is so strong on these points at the present time that Plaintiffs genuinely believe themselves entitled to summary relief on the

Government contractors Defense question, since it now seems almost conclusive that the Government did not "establish" the specifications and for the other reasons we discussed in our Supplemental Reformulation Brief. There are numerous other reasons why, as a matter of law, the Defendants cannot satisfy elements one and two.

In the final analysis, however, for the same reasons we believe that Judge Bratt erred in rendering a partial summary judgment under Rule 56(d) for the Defendants in this complex case, it would be equally unpropitious to grant summary relief, on a partial basis, on behalf of the Plaintiffs at this time. For these reasons and because we do not want to see the Court's trial date put off, we will not file such a motion.

3. With respect to element two, it

is undisputed that the product of each of the Defendants contained some amount of dioxin. As the Court can see from the contracts which were filed as part of the records in this case, the specifications did not provide for any contaminant such as "dioxin." A copy of the specifications is attached. Simply stated, with respect to Agent Orange, Agent Purple and the other herbicides which included 2,4,5-T, they provide for a formulation consisting of the combination of 2,4-D, as previously formulated and sold by the Defendants domestically, and 2,4,5-T, as previously sold and distributed by the Defendants domestically. The Government did not delve into those specifications devised by the Defendants, particularly Monsanto, and established them in different proportions, depending upon

which herbicide was involved. But the fact remains, the formulations of 2,4-D and 2,4,5-T had been made by the Defendants and used with regard to their domestic market long before the Agent Orange project and the Government simply accepted them at face value.

In view of the fact that the specifications did not expressly mandate the presence of dioxin (the defect) in the Agent Orange product, and there was present at least some dioxin in all the products, the Defendants ipso facto must fail on element two. *Johnston v. U.S.*, 568 F.Supp. 351 (U.S.D.C., D. Kan., July 18, 1983). The Court there stated:

"Like the contract specification defense, the government contract defense only applies where the injury-causing aspect of the product was mandated by the contract."

In addition, it would appear that the Defendants' violations of the provisions

of FIFRA, 7 C.F.R. Sect. 362, et seq., preclude the Defendants from being able to satisfy element two. In this connection, we are attaching as Exhibit 4 to this Brief a summary of Plaintiffs' position with respect to the application of FIFRA.

4. In addition, there are two sub-elements of the second element (manufacture of the product in conformity with the specifications):

- (a) whether the Defendants failed to conform to express or "implied requirements" (such as the implied warranty that there would be no hazardous contaminants in the product);
- (b) whether or not there was any negligence incident to the manufacturing of the product, which Plaintiffs say occurred because the Defendants not only negligently, but indeed wilfully, manufactured the product knowing that it contained a dangerous and hazardous contaminant - even though they all admit that processes were available and

which were the state-of-the-art that would have enabled them to reduce or virtually eliminate such hazards. These elements are discussed at pp. 35-39 of Plaintiffs' "Supplemental Reformulation" brief.

At the least, it is clear that the Defendants have not conclusively negated, as it is their burden to do, fact issues with respect to either one of those sub-elements.

5. What permeates, in an overriding manner, the entire Defendant-Government relationship, is the fact that the Government developed no expertise with respect to the production of 2,4,5-T or the herbicide Orange. An example of this is attached hereto and incorporated herein as Exhibit 3, being a memorandum dated January 15, 1967, prepared by the "Defense Supply Agency" of the Department of the Army. The

memorandum was prepared in connection with the Government's consideration of the Weldon Springs project, and the acting Executive Director of the Procurement Division stated, in that regard, as follows: "Because specific knowledge in production of this material (Agent Orange) does not exist within the Government, the only basis upon which Government facilities could be used to advantage is obviously through experienced contractor operations." This confirms that the Government relied upon the Defendants and other chemical companies and chemical contractors to formulate, process and provide the product.

What is important for the Court to recognize is that the extensive amount of evidence obtained to date was acquired without any direct discovery

being engaged in with respect to elements one and two. Obviously, we are of the view that direct discovery on these two elements would bear even greater fruit.

With the foregoing procedural and factual posture in mind, we proceed now to discuss the reasons why this Court should grant our motion to allow discovery with respect to elements one and two of the Government Contractors Defense.

III.

* * * *

APPENDIX _____

LIST OF DOCUMENTS AND EXCERPTS
CONTAINED IN THE GOVERNMENT'S
OPPOSITION TO CHEMICAL COMPANIES'
MOTION FOR SUMMARY JUDGMENT BASED
ON THE GOVERNMENT CONTRACTOR DEFENSE

1. EXHIBIT: 27
DATE: April 1967
AUTHOR: Ernest R. Higgins/
U.S. Army
ADDRESSEE: Commanding General/
Army Munitions
SUBJECT: It is reported that
"[a] variety of herbicides were
procured off the shelf and shipped
to VN." *** "MILLIONS OF GALLONS
OF THE HERBICIDE 'ORANGE' HAVE
BEEN PROVIDED, ON AN UNCLASSIFIED
BASIS, BY THE DEFENSE GENERAL
SUPPLY AGENCY FOR THE U.S.A.F. THE
SPECIFICATIONS USED IN THE
PROCUREMENTS HAVE BEEN PROVIDED BY
THE MANUFACTURERS OF THE PRODUCT
AND CALL FOR A 50:50 MIX OF THE
N-BUTYL ESTERS OF 2,4-D AND
2,4,5-T."

2. EXHIBIT: 4
DATE: October 25, 1967
AUTHOR: R. B. Scott/Hercules
ADDRESSEE: W. E. Vanderbenter/
Air Force
SUBJECT: Hercules supplies its
proposed specifications for Agent
Orange: "We believe these [specifi-
cations] are both practical and
sufficiently rigid to be
acceptable to industry and to the
government agency concerned."

3. EXHIBIT: 28
DATE: June 1, 1962
AUTHOR: Keith Barrons/
Dow
ADDRESSEE: J. R. Frank/
U.S. Army
SUBJECT: Dow supplies its
specifications for 2,4-D and
2,4,5-T.

4. EXHIBIT: 5
DATE: January 30, 1968
AUTHOR: George Kampson/
Monsanto
ADDRESSEE: Edward Bartless/
U.S.A.F.
SUBJECT: Monsanto's proposals
concerning the specifications for
Agent Orange.

5. EXHIBIT: 29
DATE: January 29, 1964
AUTHOR: U.S. Army
Laboratories
Proceedings of the
First Defoliation
Conference
ATTENDEES: Herbicide Manufac-
turers, including a
number of defendants.
SUBJECT: Army turns to industry
to supply a herbicide that will
meet its military needs:
"Ordinarily with military R & D we
have a military concept that leads
to the statement of a military
requirement, technical character-
istics, performance specifications,
and other strictly delimited
aspects. In this program, we do
not have rigid specified charac-
teristics. I have stated some of

the broad requirements that a successful defoliating chemical should have, but with this general framework, we will accept and use materials that will do a job for us. In a few years, it may be that we will come up with more definite specifications, but at the moment, we simply solicit the assistance of you gentlemen in finding materials that can be used successfully with the reasonably broad and general guidelines. . . ."

6. EXHIBIT: 30

DATE: May 2, 1983

DEPOSITION:

Cecil H. Russell/
Monsanto

SUBJECT: Monsanto wrote the specifications for Agent Orange:
Q. Did you create the specifications for Orange I? A. I wrote it, my version of it. Q. Well, when you say you wrote your version of it, was not your version the one that was then incorporated into MIL specs? A. They were the same."

2. Agent Orange not manufactured in accordance with specifications of Government.

The undisputed evidence before the district court and the Court of Appeals was that: (1) all of the chemical company defendants were

called upon to produce an identical product; (2) the same performance requirements applied to all of the defendant-manufacturers; (3) the presence of dioxin was determined solely by the manufacturing process; (4) the terms of the contract made no provision for a particular manufacturing process or for the presence of dioxin; (5) the government exercised no control whatsoever over the manufacturing process; (6) the defendant-manufacturers exercised absolute discretion over the manufacturing process; (7) the chemical company defendants expressly considered the presence of dioxin in their product, and unilaterally determined the levels of the contaminant; (8) the terms of the contracts provided that inspection

and quality assurance were the responsibility of the manufacturer; (9) the levels of dioxin varied substantially depending upon the manufacturer; and (10) the defendants demonstrated that the levels of dioxin in their product could have been reduced. As we agree, *infra*, there, therefore, arises a presumption or inference sufficient to support a finding that the product they supplied to the government was defective.¹⁵ After over 200 depositions on the military contract defenses, the chemical companies failed to produce one single witness, of their own or otherwise, that the Government decision-makers was told or otherwise learned, of the presence of dioxin, the full range of its hazards, thence considered also

alternatives, and thereafter clearly made a fully informed decision to use Agent Orange as a herbicide in Vietnam. The chemical companies utterly failed to carry their burden in that regard.

3. At least a fact question existed as to whether the chemical companies knew more than the Government about the hazards of Agent Orange.

1. EXHIBIT: 33
DATE: May 4, 1965
AUTHOR: L. O. White/Dow
ADDRESSEE: Internal Memo
SUBJECT: Dow sets its own internal specifications for the level of dioxin in its 2,4,5-T.

2. EXHIBIT: 34
DATE: June 22, 1965
AUTHOR: Tiffany/Dow
ADDRESSEE: Confidential
Internal Memo
SUBJECT: Dow establishes an analytic method for detecting 2,3,7,8-TCDD in 2,4,5-T by gas-liquid chromatography.

3. EXHIBIT: 35

DATE: June 24, 1965
AUTHOR: U. K. Rome/Dow
ADDRESSEE: Ross Mulholland/
Dow

SUBJECT: Confidential
letter: "As you well know, we had a serious situation in our operating plants because of contamination of 2,4,5-T with impurities, the most active of which is 2,3,7,8-TCDD. This material is exceptionally toxic. *** If it is present in the trichlorophenol, it will be carried through into the T acid and hence into formulations which are to be sold to the public. I am particularly concerned here with persons who are using the material on a repeated basis If this should occur, the whole 2,4,5-T industry will be hard hit and I would expect restrictive legislation, either barring the material or putting very rigid controls upon it.

4. EXHIBIT: 1
DATE: March 19, 1965
AUTHOR: V. K. Rowe/Dow
ADDRESSEE: Several Herbicide Manufacturers Including Hercules

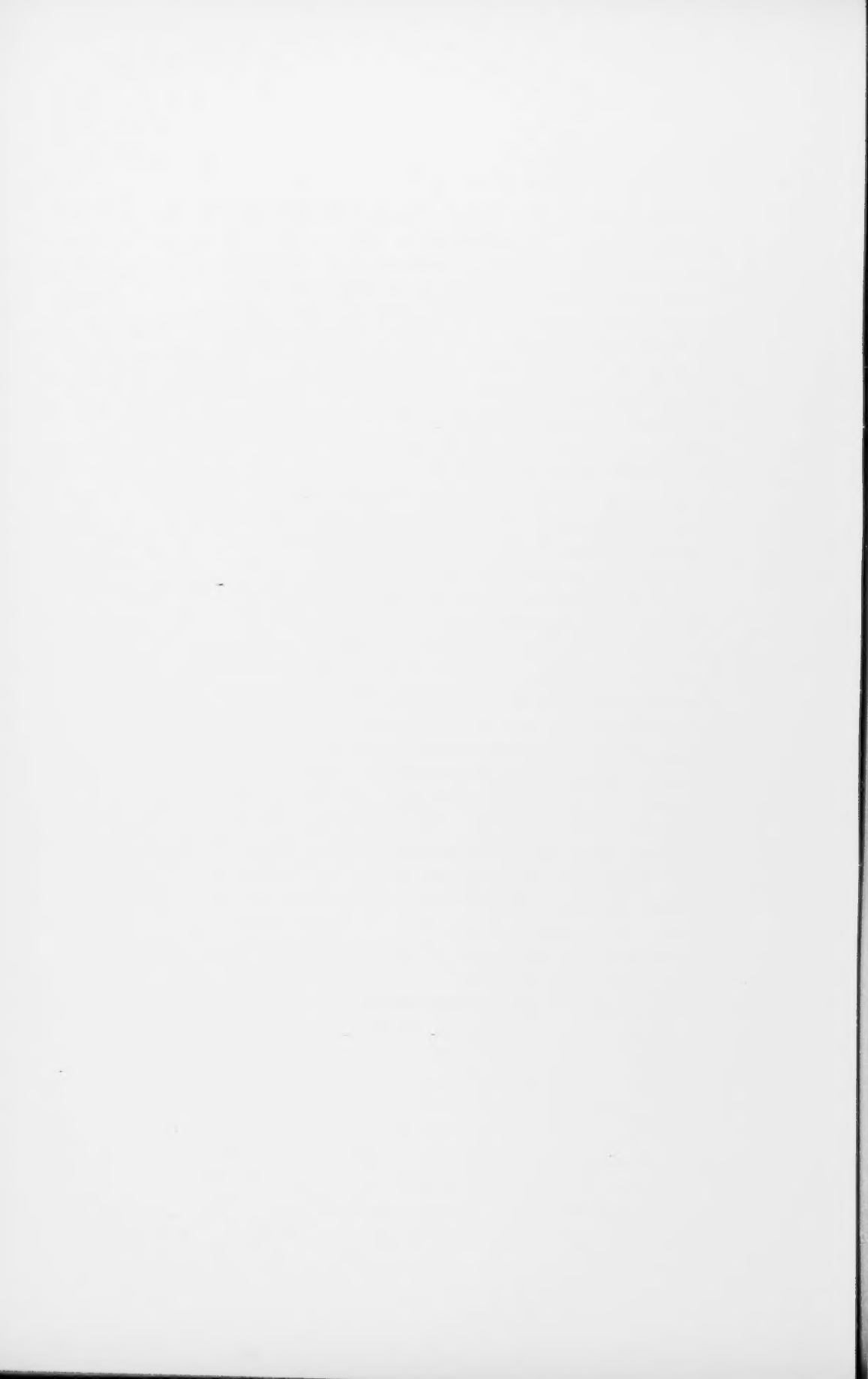
SUBJECT: Invitation to come to Dow "to discuss toxicological problems caused by the presence of certain highly toxic impurities in

certain samples of 2,4,5-T trichlorophenos and related material." *** "Our discussions will deal only with the toxicological and analytical aspects of the problem. We will not discuss manufacturing know-how, sales or anything else not dealing with the problem of health.

5. EXHIBIT: 41
DATE: March 24, 1965
AUTHOR: E.L. Chandler/
Diamond Shamrock
ADDRESSEE: Internal Memo
SUBJECT: Following the conference referenced above, Chandler concluded: "... The purpose of this meeting was obviously designed to help us solve this problem before outsiders confuse the issue and cause us no end of grief"

6. EXHIBIT: 42
DATE: July 9, 1965
AUTHOR: J.P. Frawley/
Hercules
ADDRESSEE: Memo for File
SUBJECT: Confidential notes of a telephone call concerning the acnegen problem with 2,4,5-T. "On July 9, 1965, Mr. Earl Farnham of Dow Chemical Company telephoned stating that he was calling at the request of Mr. Donald Balwin, Vice-President of Dow to inquire how serious I

considered the chloracne problem in relation to the consumer use of 2,4,5-T. *** [H]e stated that Dow had gone to great expense to alter their manufacturing conditions in order to produce 2,4,5-T acid which has less than 1 ppm acnegen. *** He then stated that Dow was extremely frightened that this situation might explode. They are aware that their competitors are marketing 2,4,5-T acid which contains alarming amounts of acnegen and if the government learns of this, the whole industry will suffer. They are particularly fearful of a congressional investigation and excessive restrictive legislation on manufacture of pesticides which might result. I advise Mr. Farnham that we shared his fear but are not aware of his allegation that the competitors' products were hazardous. He asked if Hercules had established an internal specification. I stated that he should discuss this with someone in our management....¹⁴



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

In re :

"AGENT ORANGE" : MDL 381

PRODUCT LIABILITY LITIGATION :

-----X

United States Courthouse
Brooklyn, New York

March 19, 1984
1:00 o'clock p.m.

B e f o r e:

HONORABLE JACK B. WEINSTEIN,
Chief U.S.D.J.

THE COURT: Sit down, please

Good afternoon, everybody.

The first item on the agenda is the discussion of the possible inclusion of the first two legs of the Government contract defense as an issue at trial.

I will be happy to hear counsel

MR. MUSSLEWHITE: Your Honor, Denton Musslewhite for plaintiffs.

As I get into this record more and more, your Honor, it has become quite apparent to me, as one in charge of this particular portion, that if anybody would be entitled to summary judgment with regard to the Government contract defense, it would be the plaintiffs for several reasons which we mentioned briefly in our brief, but which I would like to touch upon.

As Mr. Russell from Monsanto testified, it appears now that with

regard to element one, that the specifications were actually established -- as that term has been used in the cases -- by the chemical companies.

This is also indicated by the registration they made under the FIFRA act, Federal Insecticide, Fungicide and Roednicide Act.

However, as Mr. Russell testified -- first, there was a statement: I prepared the specifications and then he backed down on cross-examination and finally admitted he helped prepare them.

In any event, it appears that Monsanto was one of the first to contract with the Government provided the initial specifications which became the military specifications, were denominated in most of the contracts thereafter.

Secondly, as indicated by Mr. Hayward, Chief of Program Coordinatin of the U.S. Army Biological Lab -- and I will touch on these and Mr. Dean, imminent in the discovery, will touch on the facts in more detail -- your Honor indicated that the Government -- rather, the chemical companies were given wide range and latitude in the implementation and preparation of the specifications as to the use of the process to manufacture the product and the implementation of the contracts themselves.

As we pointed out in our formulation brief filed some weeks ago, this is an important element to the cases, to the efect that under element one, if the contract and the contract of the parties indicated that the Government contractors were given wise randge and discretion then the Government contract defense does not apply.

Thirdly, there is no question but that the Government has no expertise.

This is again indicated by Dale Bahione -- I believe that is the way he pronounces his name -- with regard to the Weldon Springs project.

He made it clear that the Government had no activity in the processing of this Agent Orange and relied on the chemical industry for that.

It is undisputed that dioxin was in all of the products and as stated in Johnston v. U.S., unless the defect in the product is expressly mandated in the specifications, the Government Contract Defense won't work.

It is our position, because it was not expressly mandated, that this product would have dioxin in it and therefore that dioxin, being a defect, the Government Contract Defense will not

work.

Lastly, we have included in the amended brief -- I won't take the time to go into detail except to say that defendants should be aware that we pled FIFRA from the beginning.

There is no point in going around about the situation.

We believe the evidence will show that they engaged in a conspiracy not to report and to comply with the express provisions of fifra and because they did not do so elements one, two, three -- all three of those elements cannot be satisfied as a matter of law.

I just made a brief summary of those particular points, your Honor, just to say this: We are not asking for any summary relief now because we want to try to assist the Court as we think it is in our benefit to go to trial when

the court scheduled the case to go to trial, but we think we are more entitled to summary relief because of their burden on the Government Contract Defense to satisfy every element and if we show, as a matter of law, that any of the elements cannot be satisfied, as a matter of law, the defense is out the window and we could probably seek relief under 56(d), but for the reasons we stated in our brief before the Court, we will not do so.

That leads me to the law with regard to why Judge Pratt was wrong in his order of May -- Pretrial Order 51, May 20, 1983, when he under and pursuant to Rule 56(d) made fact findings he deemed conclusive on elements one and two.

— We believe that was erroneous because under the one claim doctrine which we went into in some detail with

the express provisions of FIFRA and because they did not do so elements one, two, three -- all three of those elements cannot be satisfied as a matter of law.

I just made a brief summary of those particular points, your Honor, just to say this: We are not asking for any summary relief now because we want to try to assist the Court as we think it is in our benefit to go to trial when the court scheduled the case to go to trial, but we think we are more entitled to summary relief because of their burden on the Government Contract Defense to satisfy every element and if we show, as a matter of law, that any of the elements cannot be satisfied, as a matter of law, the defense is out the window and we could probably seek relief under 56(d), but for the reasons we

stated in our brief before the Court, we will not do so.

That leads me to the law with regard to why Judge Pratt was wrong in his order of May -- Pretrial Order 51, May 20, 1983, when he under and pursuant to Rule 56(d) made fact findings he deemed conclusive on elements one and two.

We believe that was erroneous because under the one claim doctrine which we went into in some detail in our brief -- I don't want to take the time of the Court now to detail it -- to go through that again, except to say there are several New York Federal Court cases, three District Court cases and one Second Circuit case which indicate that if the claims are so intertwined and revolve around the same facts, that the Court simply should not grant summary relief, particularly in a

complex case like this one.

I don't want to quote all the cases but they are emphatic that this is not an appropriate case for summary relief and we believe that Judge Pratt erred in that respect; that it would be more appropriate to try all the claims together.

He himself stated, your Honor, in his pretrail order 51, and previous orders of February 24, 1982 and December 29, 1980, that the facts were intertwined.

As a matter of fact, he said elements one and two really turned on the facts to be disclosed with regard to element three.

Under our reformulation brief we filed earlier, we vehemently disagreed with that proposition.

However, we certainly agree with Judge Pratt's conclusion that the facts, the elements and issues before this Court are just hopelessly intertwined, so any type of ruling under Rule 56(d) would be inappropriate and we cited the cases for those propositions.

The Court has it before it: The Kollsman case, Taylor v. Rederi, McNellis, Toyishima, E.I. duPont and Powell v. Radkins.

The law of the case doctrine presents no problem because as Judge Learned Hand said, it is really a doctrine where the Court needs only to take a practical approach to the lawsuit and certainly, there is nothing magic about the law of the case doctrine to preclude this court from reconsidering Judge Pratt's rulings on elements one and two, just as this court considered

the rulings as to leaving out two of the defendants and they are back in the case.

There is no doctrine which would preclude the court from taking the same action with regard to elements one and two it took with regard to Thompson Chemical and Hercules.

So, in sum, your Honor, we believe this is an appropriate situation for this court to grant us relief.

The Court felt the Order had some sort of finality -- which it didn't -- even if your Honor believed that, Rule 60(b) is a perfect vehicle for this court to utilize in reconsidering and changing that prior order of Judge Pratt and pretrial order 51.

Certainly everybody will allow the Court to do this and the matters disclosed about the time of Judge

Pratt's rulings or since -- much of this was not before Judge Pratt.

We are prepared to try to reduce our discovery down to the bare bones and so have thus filed a list of 29 Government witnesses which we indicate to the Magistrate and Court we will try to take the first 12 and see if that will satisfy us.

We will make every effort to take 12 and see where we are and if there is a problem, have a meeting with the Magistrate and see if we need to go further.

In view of the situation that developed with regard to FIFRA -- and I want to thank our Law Committee for soing such a fine job in brief ing that -- and upon their advice, we would like to substitute for the Secretary of Agriculture or the Custodian of Records,

with regard to the information given by the defendants, under the FIFRA Act and we believe that will justify the conclusion as a matter of law, that they are not entitled to the Government Contract Defense and may establish, per se, liability, because of the misdemeanor and felony portions of those acts. I'd like to have Mr. Dean talk a little bit about the equities and demonstrate that at least -- at least, there is a fact issue as to elements one and two and we should be entitled to submit those issues to the jury.

* * * * *

THE COURT: As I understand it, you have two applications; one, to reverse the Magistrate's ruling with respect to discovery --

MR. DEAN: Yes, your Honor.

THE COURT: On that, denied.

I am affirming the Magistrate's ruling.

You will have no further discovery on that point. That is a separate point. You have had substantial discovery on it by your own submissions, orally and in your briefs so that you have had enough on the point to go forward. So, I will not extend any further discovery on those two legs.

MR. DEAN: Of much greater importance, your Honor --

THE COURT: The second point, as I understand it, is that you don't want to be precluded at the trial from findings on this.

That seems to me a much more serious problem and I understand it and I cannot decide it until after I hear from the other side. But you can take all the time you want.

MR. DEAN: I was just going to comment -- one argument that has been made by the plaintiffs, does not impress your Honor, and that is the argument that no matter what has been decided Monsanto and Diamond Shamrock are not bound because they never made a motion and with as much alacrity you can say they are bound --

THE COURT: I --

MR. DEAN: I don't press that.

THE COURT: Everybody is in the case and I am not going to have separate rulings on that key issue.

We are having one trial and not a series of them.

I am not interested in that technical point.

MR. DEAN: We acknowledge that it is a technical point and we do not press it.

The specifications say all supplies under this contract will be free from defect in design, material and workmanship.

Dioxin is a defect. It is the most volatile, incidious poison made. Element two is not proven and we just say, give us a chance to show it to the jury, Judge.

MAGISTRATE SCHEINDLIN: I never made a ruling as to whether or not there should be further discovery on the issue. There was no such ruling to be appealed from.

THE COURT: Then it will save us a lot of time.

Don't bother the Magistrate. We are not going to have further discovery on the point.

* * * * *

THE COURT: No. We should

discuss it so we can help one another understand it, if we can.

That is why you are up, to help me understand the position.

Let me turn to Page 4, if I may.

The problem here is the problem of trial.

We are going to have a trial of fact that is going to have to evaluate many conflicting lines of proof in order to determine what the probabilities are with respect to a series of material propositions, however we ultimately decide the formula or how to formulate it.

Among those propositions are that this substance did cause certain problems to the plaintiffs; that the plaintiffs who are being tried here do have certain problems as a result of these substances; that they did suffer

certain damages and so on -- all by a preponderance of the evidence.

Part of the problem, both with respect to the theory of negligence; that is, that the defendants knew or should have known and didn't act in a reasonable way, as well as on the issue of liability based on some other manufacturere's theory, will be based upon what they knew and did in this case and whether they acted reasonably, even under the negligence theory, putting aside the strict liability problem.

Now, when you are dealing with that kind of series of factual problems and series of lines of proof, when you take any element or any line of proof and you say that for the purpose of this trial, this fact is established as a matter of law, you create serious problems for the fact finder because the fact finder then

has to determine that that line of proof is 100 percent proof and evaluate that line of proof as against the whole series of other lines which may have been proved to a degree less than 50 percent or more than 50 percent and so on.

We have a shifting mosaic and ultimately, we will have to make a series of very difficult decisions, something like the presumption problem.

It used to be that you could say in some jurisdictions that presumption was evidence and we have gotten away from that because a jury is not in a position to evaluate a fixed 100 percent probability against a whole series of indefinite probabilities.

So, we are dealing with a very difficult abstract and theoretical problem in fact finding.

THE COURT: So if we look at these three items on Page 4, the essential problem, it seems to me with respect to Government defense as well as contract defense, as well as with the fact of the negligence and the strict liability, too, to an extent is Item 3; that the Government knew as much as or more than the defendants about the hazard to people that accompanied the use of Agent Orange.

Now, how much did the Government know?

Well, one of the aspects of determining how much the Government knew is to look into the way that under Item 1 the Government established specifications.

If the Government didn't establish any of the specifications, but they said

to the defendants, we don't know anything about it, you established the specifications, it is a strong piece of evidence with respect to the issue of how much the Government knew or how much the defendants knew.

So shall I tell the jury in determining Item 3 that you must assume 100 percent that the Government establish the specifications and it is irrelevant that the Government may have been selecting off-the-shelf item with respect to components? Or that the defendant's participated in the discussion of specifications because they may have known more, or can we consider all of that and can I let all of that in?

Or with Item 2, that the Agent Orange manufactured by the defendants met the Government specifications in all

material respects? Was one of the specifications that it not contain dioxin? Was dioxin an extraneous element? Or did the specifications have to say that you must produce this series of chemicals and there must be no dioxin in it, or you can have dioxin in it up to a certain percent? It's 94 percent pure and the impurities can be anything you want to put in it, arsenic, dioxin, anything?

What does this mean in terms of Item 3?

Now, I understand the analytical beauty of what Judge Pratt has done. And I as always admire his skill in handling these matters. But from the point of view as the trier of the facts I find it very difficult to say that Items 1 and 2 are definitely established 100 percent, and that bearing on 1 and 2 had no

relevancy with respect to 3?

As far as I am concerned, the central problem in the contract defense is Item 3. And that is going to be an essential problem with respect to negligence and probably an essential problem with respect to . . .

* * * * *

THE COURT: More important than that, items one and two will have a very important bearing as factual matters on the issue of negligence and perhaps strict liability. And I don't want the negligence issue in effect resolve by my having to tell the jury this is what the Government has ordered. They ordered 98 percent pure, including in the two percent, including their dioxin, and that they met those specifications. That I will not do. And if you understand that, that is fine with me. I don't care how

you formulate the Government Contract Defense.

I am not sure you will formulate it exactly as number three indicates. I think that will have to be discussed further. But essentially the Government Contract Defense is one of knowledge.

* * * * *

MR. KROHLEY: The point I am making is Judge Pratt made two specific factual determinations. I don't think either of those two factual determinations have a direct bearing on issue number three. And to argue to a jury issue number two is some misleading way.

THE COURT: He didn't make any factual determination.

MR. KROHLEY: He said there is no issue of fact.

THE COURT: You said there is no

issue of a fact for the purposes of trial. That is not a factual determination as far as I am concerned. He said on the basis of the information we now have and can reasonably be expected to have, the plaintiff cannot establish by a preponderance of the evidence that the Government didn't make the specifications, whatever making the specifications means, and they cannot establish by a preponderance that they didn't meet the specifications. But he didn't talk about dioxin as being within the specifications. Nor did he say that the plaintiffs couldn't establish by a lesser degree of proof when taken with all the other proof in the case by not permit the plaintiffs to show no contract, Government Contract Defense and all the other things they are going to have to show.

There has been no finding of fact on Items one and two, except in a limited way I have indicated for summary judgment. We all recognize that. Then the trial will proceed exactly as it would have if he hadn't made that decision. And the only problem is going to come when I grant your request to charge and how I frame it for the jury on who has the burden to do what.

* * * * *

MR. MILLER: My I respectfully disagree? I think points one and two have been established because no evidence of a probative nature was put in to create a question of fact and our jurisprudence says that some issues must come to an end. And even the most excited say that everything must be hurled at the audience in every situation. And the audience in this case

being the jury.

THE COURT: I understand the position. If that is the position, I am going to set aside the granting of the motion for summary judgment to that extent. I am not going to allow that preclusion to opt in this case based on what I have heard.

* * * * *

THE COURT: We are going to at some point formulate these matters for the jury and it will help me decide what is right. But I can tell you that the evidence which is relevant on one and two seems to me is relevant on three. And one and two has not established any facts, except as I have indicated.

* * * * *

THE COURT: I think down the line, within the next month or so, we are going to have to come to grips with

a preliminary ruling subject of course to later clarification as to how I am going to present this. I think the case is so complex that a preliminary charge would be in order. And to the extent that we can, give them some guidance from what they are supposed to be looking at as they see this mass of data which is helpful to do so. but on the other hand I don't want to get so pinned down by an opening charge or have you so pinned down that we can't during the course of four or six month trial modify the questions we are going to put to the jury based on what we are going to hear and what we later learn.

Appendix IV

Medical Causation.

Dioxin is the most toxic synthetic substance known to man. Dr. Marvin Legator, Professor and Director of Division of Environmental Toxicology and Epidemiology, University of Texas Medical School, stated:

Dioxin should not be considered just another toxic pollutant. In fact, it is one of the most potent chemicals known. Consider that with many potent toxic chemicals we find adverse health effects in the parts per million (ppm) range. With dioxin in animal studies cancer and reproductive effects are reported in the parts per billion (ppb) and parts per trillion (ppt) range. To gain insight as to what a ppt represents, consider a ppt as being approximately the surface of a quarter in 186.6 square miles, or 2 drops of water in 100 olympic sized swimming pools, each containing 260,000 gallons of water. Yet concentrations in this range [of dioxin] are toxic.¹³

Scientific literature confirms the toxicity of dioxin. See, Doc. 5400, pp. 71-144, Rec. 5400. After a review of that literature, Dr. Ellen Silbergeld of the Environment Defense Fund executed an affidavit which stated:

In my scientific opinion, these studies taken together and evaluated carefully for such considerations as dose and length of exposure, sensitivity of measurement, and power (size of study and length of follow-up), support the opinion that human exposure to Agent Orange (its constituents, 2,4,5-T and dioxin causes peripheral and central neuropathy; hepetic toxicity; including porphyria similar to porphria cutanea tarda; hyperlipidemia and hypercholersterolemia, as well as associated cardio-vascular and cardiorenal diseases; reproductive disorders including birth defects and infertility; and cancer, in addition to chloracne.

As to the ten representative plaintiffs' going to trial, according

to a brief filed by the PMC after the court had given preliminary approval to the settlement, "plaintiffs' expert witnesses, Drs. Codario, Legator, Orris, Hay and Silbergeld each intended to testify that 'Agent Orange' and its contaminant TCDD (dioxin) is (1) highly toxic and (2) carcinogenic." Doc. 4637, p. 40, Rec. 4637. Dr. Ronald Codario was prepared to attribute Michael Ryan's chloracne to his exposure to dioxin in Vietnam. Drs. Peter Orris, Alastair Hay, Allen Levin, Marvin Schneiderman and Ellen Silbergeld were all prepared to testify that Danny Ford's soft tissue sarcomas "were caused by his exposure to Agent Orange contaminated with dioxin. *Id.* at 53. Dr. Levin was prepared to testify that the representative plaintiffs'

immunologic tests were totally consistent with immune dysregulation caused by exposure to dioxin. *Id.* at 58-60. Dr. Codario was prepared to testify that Michael Ryan's peripheral neuropathy was in his medical opinion related to Agent Orange exposure. *Id.* at 62-63. Dr. Peter Orris was prepared to testify that George Ewalt's neurological disorders were probably caused by his exposure to dioxin. *Id.* at 63. Dr. Peter Orris and Dr. Ronald Codario were prepared to testify that George Ewalt's basal cell carcinoma was caused by his exposure to dioxin. *Id.* at 67. Dr. Lennart Hardell was prepared to testify, to a reasonable degree of medical certainty, that David Lambiotte's lymphocytic lymphoma was caused by his exposure

to Agent Orange. *Id.* at 68 (this includes reference to the famous "hordell Study" in Sweden). After examining Danny Ford, Dr. Codario stated that it was his opinion that Mr. Ford's soft-tissue sarcoma was caused by his exposure to Agent Orange. *Id.* at 69.

In addition, Dr. Deborah Barsotti ("Reproductive dysfunction has been associated with exposure to TCDD (dioxin) in experimental animals and man as well"); Dr. K. Diane Countney, of the E.P.A.; Dr. Maurine Hatch, Asst. Professor of the Division of Epidemiology at Columbia University; Dr. Hay; Dr. Legator; Dr. Levin and Dr. Silbergeld all were prepared to lay a proper predicate for causation of miscarriages and birth defects generally and that the

exposure of Ryan and Jordan to dioxin probably caused the miscarriages of their wives and the birth defects in their children.

.....

16. Recent epidemiological studies clearly provide epidemiological support for plaintiffs' causation case. *Ranch Hand Mortality Study* (June 1983) (JA 16649) (findings are excess of deaths from malignant neoplasms, digestive system maladies and endocrine disorders); *Ranch Hand Morbidity Study* (Feb. 1984) (JA 4418) (detected statistically significant melanotic skin cancer, minor birth defects, neonatal deaths and physical handicaps in Ranch Hand's children, subjective deficits, symptoms resembling porphyria cutanea tarda and leg pulse deficits); *Australian*

Mortality Study (Sept. 1984) (found Vietnam veterans die 2.06 times more than non-veterans and statistically significant excess deaths from diseases of the cardio-vascular and digestive systems); *The Texas Study* (March 1984) (JA 16740) (found statistically significant adverse effects upon immunological - suppressant system); *The New York Mortality Study* (March 1985) (JA 14913 (veterans 1.44 to 1.82 times more likely to die of suicide, 1.37 to 2.25 of lung cancer, 1.36 to 2.77 of melanoma and 1.17 to 1.83 of cardio-vascular disease); *Royal Australian Commissioner* (1985) (noted Australian Mortality Report reflected that mortality rate of Vietnam veterans was statistically significant 29% higher than that of non-veterans); *Australian Birth Defects Study* (Jan. 1983) (JA 16474)

(because of 1.5 (50%) excess further study of ventricular septal defects and Down's syndrome); *Massachusetts Mortality Study* (Jan 1985) (JA 13329) (reports statistically significant elevation of deaths due to kidney cancer, stroke and connective tissue cancer); *CDC Birth Defects Study* (Aug. 1984) (JA 9409) (found statistically significant high risk of fathering a child with spine bifida, cleft lip with or without a cleft palate and other neoplasms such as Wilms tumor); and the *West Virginia Mortality Study* (Jan 1986) incidence of malignant cancers of the respiratory system and soft tissue and connective tissue cancers and neoplasms of the skin).

DEC 1 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

BARRY KRUPKIN, et al.,

Petitioners,

v.

DOW CHEMICAL CO., et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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(Counsel of Record)

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Incorporated, T H Agriculture
& Nutrition Company, Inc.,
Diamond Shamrock Chemicals
Company, Uniroyal, Inc. and
Thompson Chemicals Corporation*

(Additional Counsel Listed on Inside Cover)

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Question Presented

Whether certiorari should be granted to review the settlement of a unique product liability class action, where the settlement was examined in the light of all relevant circumstances and found by both lower courts to be fair.

Parties Below

The Parties to the proceedings below, as required by Supreme Court Rules 22.1 and 34.1, are the Petitioner, Barry Krupkin, and the Respondents, The Dow Chemical Company, Monsanto Company, Hercules Incorporated, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc. and Thompson Chemicals Corporation.*

* The parent companies, subsidiaries and affiliates of the corporate parties, as required by Supreme Court Rule 28.1, are:

The Dow Chemical Company, Respondent.

Alamo Land Company, Inc.; Arabian Chemical Company; Compagnie des Services Dowell Schlumberger; Chief Shipping Company; DCU/LB TRUST; Cromarty Petroleum Company Limited; Scotdril Offshore Company; Chimtrade; Vorakim Kimya Sanayi Ve Ticaret A.S.; Transformadora de Etileno S.A.; Dowell Schlumberger Canada Inc.; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech Inc.; MT Partnership; Wabiskaw Explorations LTD.; Haeger and Kaessner Limited; Viopol S.A.; Oronzio de Nora Technologies S.p.A.; Dow Corning Corporation; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Insul/Crete Company, Inc.; ISOPOR—Companhia Portuguesa de Isocianatos Ltda.; Ivon Watkins-Dow Limited; Joliet Marine Terminal Trust Estate; M.D. Kasei Limited; Funai Pharmaceuticals Company Ltd.; First Chemical Factoring S.p.A.; Laboratorios Industriales Farmaceuticos Ecuatorianos (L.I.F.E.); MDP (Holdings) Ltd.; Metal Mark, Inc.; Fort Saskatchewan Ethylene Storage Corporation; Oronzio de Nora Impianti Elettrochimici S.A., Lugano; Oronzio de Nora Technologies B.V.; Oronzio de

(footnote continued on following page)

(footnote continued from preceding page)

Nora Technologies S.p.A.; P.T. Pacific Chemicals Indonesia; Pacific Chemicals Berhad; Pacific Plastics (Thailand) Limited; Petroquimica-Dow S.A.; The Cynara Company; Vorakim Kimya Sanayi VE Ticaret A.S.; Zip Pak Incorporated.

Monsanto Company, Respondent.

ACM Services, Inc., Advent Eurofund Limited, Advent-Techno Venture Investment Corp. N.V., Australian Fluorine Chemicals Pty. Limited, Companhia Duasileria de Dsuirena, Fosbrasil S.A., Hydrocarbon Products Pty. Ltd., K.K. Astro, Invitron Corporation, Kinetek Systems Incorporated, Korag Company Limited, Korsil Company Limited, Limewood Run-Off Limited, Mitsubishi Monsanto Chemical Company, Monsanto Chemicals of India Limited, Monsanto Chemicals (Thailand) Limited, Monsanto (Malaysia) Sendirian Berhad, Nippon Cooper Kabushiki Kaisha, Nippon Fisher Company, Ltd., Nomix Manufacturing Company Limited, NutraSweet AG, Quimica do Triangulo Ltda., Revertex Industries (Aust.) Pty. Limited, Revertex Industries (N.Z.) Ltd., Revinex Australia Limited, Ryowa, K.K., Titan Chemicals Limited, Tsukuba Service Company, Ltd.

Hercules Incorporated, Respondent.

A.C. Hatrick Chemicals Pty. Ltd., A.C. Hatrick, (N.Z.) Ltd., A/S Kobenhavens Pektinfabrik (CPF), A/S Kobenhavens Pektin Fabrik, Abieta Chemie GmbH, AEONIC Systems, Inc., Algas Marinas S.A., Alkyls do Brasil Ltds., Aqualon Company, Austchem Nominees Pty. Ltd., Australian Chemical Holdings Ltd., BHC Laboratories, Inc., Caribbean Lumber Co., Centennial Lumber Company, Ceratonia, S.A., Cesalpinia, S.p.A., Champlain Cable Corporation, Compania Brasil Eira De Productos, Curtis Bay Insurance Co. Ltd., Dawood Hercules Chemical Ltd., Devron Hercules Inc., DIC-Hercules Chemicals Inc., EKC Technology, Inc., Electronic Display Systems, Inc., EPICOR Laboratories, Inc., Genu Products Canada Limited, Genu Products Philippines Inc., Hafimij B.V., Hercochem (H.K.) Ltd., Hercofina Europe V.O.F., Hercofina Joint Venture, Hercoform Incorporated, Hercoform Marketing Inc., Hercules Aerospace Espana, S.A., Hercules Andino S.A., Hercules Canada, Inc., Hercules Chemical Corporation, Hercules Chemicals Investments Pty. Ltd., Hercules Chemicals B.V., Hercules Credit Inc., Hercules de Centro America S.A., Hercules Defense Electronic Systems, Inc., Hercules Do Brasil Productos

(footnote continued on following page)

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Quimicos Ltd., Hercules Far East Ltd., Hercules Finance Co. Ltd., Hercules France S.A., Hercules GmbH, Hercules (Holdings) Ltd., Hercules International Trade Corporation, Hercules Islands Corporation, Hercules Kemiska Aktiebolag, Hercules Ltd., Hercules Overseas Corporation, Hercules Taiwan Co. Ltd., Hercules Trading Corporation, Herdillia Chemicals Ltd., Hersean PTE Ltd., Himont, Belgium, Himont, Canada, Himont Incorporated, Himont, Italia, Himont U.S.A., Inc., Holden Vale Mfg. Co. Ltd., Infinetics, Inc., Inmobiliaria Petrocel, Intermarine USA, Mathersa Industries Quimicas, S.A., MICA Corporation, MICA TEK Sales, Inc., MICRON Sales Inc., Moplefan N.V., Moplefan S.p.A., Moplefan (U.K.), Oy Hercofin Ab, NFW (Australia) Pty. Ltd. PFW (Deutschland) B.V. & Co. Aromen, PFW (Leasing) B.V., PFW Ltd., PFW (Nederland) B.V., PPD Hercules, Inc., P.T. Hercules Mas Indonesia, Patex Chemie GmbH, Etichem S.A., Petrocel S.A., Petroleum Fluids, Inc., Polo Industria E. Commerciale Ltda., Pomosin AG, Quimica Hercules De Columbia Limited, Quimica Hercules S.A. de C.V., Quimproc, S.A., Rika Hercules Inc., Rohe, S.A. Ross Pulp & Paper, Inc., Semi-Gas Systems, Inc., Simmonds Industries Inc., d/b/a Cooperative Industries Inc., Simmonds Precision AG, Simmonds Precision Engine Systems, Simmonds Precision Ltd., Simmonds Precision Motion Controls, Inc., Simmonds Precision NV, Simmonds Precision Products Inc., St. Croix Petrochemical Corp., Sumika-Hercules Co. Ltd., Taiwan Hercules Chemicals, Inc., Taloquimia, S.A., Teratec Systems Inc., Texas Alkyls Belgium, S.A., Texas Alkyls Inc.

T H Agriculture & Nutrition Company, Inc., Respondent.
North American Philips Corporation.

Diamond Shamrock Chemicals Company, Respondent. The parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates of Occidental Electrochemicals Corporation (formerly named Diamond Shamrock Chemicals Company) are as follows:

Occidental Petroleum Corporation, Occidental Petroleum Investment Co., Occidental Chemical Holding Corporation, Oxy-Diamond Alkali Corporation, Canadian Occidental Petroleum Ltd., Occidental Chemical Corporation, Carbocloro S.A. Industries Quimicas, Korea Potassium Chemical Co. Ltd., Thai Diamond Shamrock Chrome Limited, Thai Diamond Shamrock Limited, Sanital Comercio e Empreendimentos, Petway Products Distributors, Inc., International Ore & Fertilizer Belgium SA, Oxy Metal Industries (France)

(footnote continued on following page)

(footnote continued from preceding page)

SA, OxyTech Systems, Inc., Plasticos y Derivados Compania Anonima, Plastiflex, C.A., Malharia Industrial do Nordeste SA, Industries Oxy S.A., Sumitomo Durez Co. Ltd., Industries Quimica de Portuguesa SA, Mississippi Chemical Corporation, Occidental Minerals (Philippines) Inc., Tororo Industrial Chemicals & Fertilizers Limited, Trans-Jeff Chemical Corporation, Distribuidora y Exportadora Udylite, S.A.

Uniroyal, Inc., Respondent, was dissolved pursuant to the laws of the State of New Jersey.

Thompson Chemicals Corporation, Respondent.

Wm. T. Thompson Co.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-620

BARRY KRUPKIN, et al.,

Petitioners,

v.

DOW CHEMICAL Co., et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents The Dow Chemical Company, Monsanto Company, Hercules Incorporated, T H Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc. and Thompson Chemicals Corporation, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit affirming the approval of the class action settlement in the *Agent Orange* multidistrict litigation.

Opinions Below

The opinions below are adequately set forth in the Petition with the following additions:

The opinion of the United States Court of Appeals for the Second Circuit dated April 21, 1987 reversing the district court's order which refused to set aside class counsel's fee agreement is reported at 818 F.2d 216 (2d Cir. 1987) and is reprinted in the Respondents' Appendix annexed hereto pp. A1-A21.

The Memorandum and Order of the United States District Court for the Eastern District of New York denying the motion to set aside class counsel's fee agreement is reported at 611 F. Supp. 1452 (E.D.N.Y. 1985) and is reprinted in the Respondents' Appendix annexed hereto pp. A22-A48.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Constitutional Provisions, Statutes and Rules

1. The Fifth and Fourteenth Amendments to the United States Constitution.
2. Fed. R. Civ. P. 23(e), pertaining to settlement of class actions, provides as follows:

DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Statement of the Case

Petitioner, a member of the class of veterans who allegedly were injured by exposure to Agent Orange in Vietnam, seeks a writ to have this Court engage in a detailed review of the totality of circumstances relevant to, and to overturn as unfair, a \$180 million settlement of the class action against the makers of Agent Orange, notwithstanding that the settlement was approved by both lower courts after a comprehensive analysis of precisely those same circumstances.

The *Agent Orange* litigation began in late 1978 and early 1979. By the time of settlement in May 1984, more than 500 individual and representative actions involving more than 11,000 named plaintiffs had been filed in federal and state courts across the country. The state actions were removed to federal court and, by orders of the Panel on Multidistrict Litigation, consolidated for all pretrial purposes in the United States District Court for the Eastern District of New York with all other *Agent Orange* actions.

In or about September 1983, after the elevation of the original transferee judge to the court of appeals, Chief Judge Jack B. Weinstein succeeded as transferee judge in the multidistrict proceeding. At a conference with counsel in October 1983, Judge Weinstein gave notice that he intended to enter an order formally certifying an appropriate case as a class action on behalf of all Vietnam veterans and their family members who were injured by the veterans' exposure to Agent Orange in Vietnam; and that trial of that action would begin on May 7, 1984. The court directed plaintiffs' attorneys to select as bellwether claims for trial on that date their ten best cases. JA 2585;* *see* 597

* Citations preceded by JA are to the Joint Appendix filed in the court of appeals.

F. Supp. 740, 752 (App. 157a).^{*} In December 1983, the court entered a formal order of class certification. 100 F.R.D. 718, 729 (App. 477a).

Negotiation of the Settlement

Approximately two months before the scheduled start of trial on May 7, 1984, court-appointed class counsel (the nine member Plaintiffs' Management Committee) initiated settlement discussions and solicited the participation therein of the district court. JA 17192-95. With the consent of all parties, the district court agreed to participate, *see* JA 17194-95, 3804-05, and in April 1984, the court appointed three settlement masters to oversee settlement discussions, *see* 597 F. Supp. at 752-53, 762 (App. 157a, 179a); JA 6627-28, 6735-36.

Class counsel thereafter made an initial settlement demand of \$650 million; defendants offered nothing. JA 11515-16. After weeks of discussion, seven days before trial, class counsel had reduced their demand to \$250 million. *See* JA 13614-15. As the trial date approached, the district court directed that, on the weekend before the Monday trial, representatives of the parties attend courthouse settlement discussions conducted by the settlement masters, and gave notice that it too would be available to the parties on both days at that location.

Early in the weekend of May 5 and 6, defendants made an initial offer of settlement of \$100 million. *See* JA 11106. The parties spent the remainder of the weekend bargaining between the amounts of \$100 million and \$250 million until agreement was reached in the early morning of May

^{*}Citations preceded by App. are to the Single Appendix filed in this Court by the petitioners in *Lombardi v. Dow Chemical Co., et al.*, No. 87-436.

7, 1984 on \$180 million, and on the other terms and conditions of settlement. A stipulation of settlement was entered that day, and a detailed settlement agreement was signed and submitted to the court on June 11, 1984. JA 6685-703. Class counsel, including Benton Musslewhite, Petitioner's counsel of record herein and a signatory to the agreement, unanimously recommended approval of the settlement to the district court. 597 F. Supp. at 760 (App. 174a); JA 11512-13.

The District Court's Evaluation of the Settlement's Fairness

a. *Settlement Notice and Fairness Hearings*

On June 11, 1984, the district court ordered that notice of the proposed settlement be given by mail and by various forms of publication. 597 F. Supp. at 866-67 (App. 409a-11a). The notice described the litigation and settlement, announced a schedule of fairness hearings, and provided claims information. It also included a copy of the settlement agreement and a claims form. *Id.* at 867-75 (App. 412a-28a); JA 6708-31. A separate notice was directed to veterans who opted out of the class inviting them to rejoin, and many rejoined the class. 597 F. Supp. at 875-76 (App. 428a-40a); JA 6732-34, 14725-28.

In August 1984, the district court reviewed hundreds of written communications from veterans and considered the views of nearly 500 witnesses during 11 days of fairness hearings in five different cities. 597 F. Supp. at 748, 764 (App. 148a, 184a).

b. *Preliminary Approval by the District Court*

On September 25, 1984, the district court filed a lengthy opinion in which it preliminarily approved the settlement as fair, reasonable and adequate to the class, and found

that the negotiation process was proper and that the settlement was the result of arm's length negotiations. The weaknesses in plaintiffs' case and the strength of defendants' defenses were decisive factors supporting the settlement. *Id.* at 775, 799, 816 (App. 207a, 256a, 296a).

Specifically, the court found:

- Plaintiffs' scientific and medical evidence on "general causality . . . lack[ed] sufficient probative force . . . to permit a finding of general causality." *Id.* at 782-83 (App. 223a);
- The ailments allegedly suffered by plaintiffs do not occur in the Agent Orange exposed population with greater frequency than in the population at large. *Id.* at 819 (App. 302a); *see* 611 F. Supp. 1223, 1239 (App. 518a);
- Epidemiological evidence established that "no *individual plaintiff* would be able to prove that his or her particular adverse health effects are due to Agent Orange exposure." 597 F. Supp. at 748 (App. 146a) (emphasis in original); *see id.* at 833-43 (App. 334a-55a);
- "The government contract defense in this case is powerful," *id.* at 799 (App. 256a), and "there is a substantial probability that defendants would prevail" on that defense at trial, *id.* at 747 (App. 146a). *See id.* at 795, 843-50 (App. 247a, 355a-72a);
- Substantial uncertainty exists as to the substantive law applicable to plaintiffs' liability claims, and repeated trials and appeals were almost a certainty. *Id.* at 749 (App. 149a);
- Many plaintiffs' claims were barred by the applicable statute of limitations. *Id.* at 748, 800-16 (App. 146a, 257a-96a); and

- Plaintiffs “conceded [the] inability of any veteran to identify the manufacturer of the herbicide to which he was exposed.” *Id.* at 819 (App. 301a-02a); *see id.* at 748, 842 (App. 146a, 355a).

With regard to the negotiation process, the court found:

- The district court “had closely followed the settlement negotiations.” *Id.* at 760 (App. 174a);
- The negotiations had been conducted at arm’s length by class counsel who were able and experienced. 611 F. Supp. 1296, 1304, 1331-34;
- There was a history of vigorous prosecution of the litigation. 597 F. Supp. at 746, 750, 757-58 (App. 143a, 150a-51a, 167a-70a);
- The status of discovery on the eve of trial assured that class counsel were aware of the relative strengths and weaknesses of their case. *Id.* at 760 (App. 174a);
- Every member of class counsel had been involved in the intensive settlement negotiations. *Id.*; and
- The negotiations were “observed by Special Masters accountable to the court insuring against any selling out of the class for the benefit of insiders.” *Id.* at 762 (App. 179a).

The court made its preliminary approval of the settlement subject to hearings on attorneys’ fees and preliminary consideration of plans for distribution. *Id.* at 862 (App. 399a).

c. Class Counsel’s Fee Sharing Agreement

The court directed that applications for attorneys’ fees be submitted to the court by the end of August 1984.

611 F. Supp. 1452, 1454 (Resp. App. A24).^{*} Class counsel submitted a joint fee application, which disclosed to the court for the first time an agreement concerning the allocation of attorneys' fees among the members of class counsel. *Id.* (Resp. App. A24-25). Pursuant to the fee sharing agreement, as revised, six members of class counsel were to receive a three-fold return of funds advanced by them to maintain the litigation. *Id.* (Resp. App. A25).

The district court carefully examined the agreement and its "theoretical incentive to settle early," *id.* at 1461 (Resp. App. A40), and found, based on its "direct observation of counsel, the litigation and settlement negotiations, [that] there is no reason to believe that the existence of [class counsel's] fee-sharing agreement had any appreciable untoward effect on the decision to settle." *Id.* (Resp. App. A41). The court declined to invalidate the agreement, *id.* at 1464 (Resp. App. A48), but determined that the "quasi-public" nature of class actions required that all future internal fee allocations among class counsel be reported to the court at their inception, *id.* at 1462-64 (Resp. App. A44-48). The court ordered that the local rules of the district be amended accordingly. *Id.* at 1464 (Resp. App. A48).

d. The Distribution Plan

In its order preliminarily approving the settlement, the district court authorized Special Master Kenneth R. Feinberg to solicit proposals for distribution of the settlement proceeds, and established the Agent Orange Advisory Board to assist the Special Master. 597 F. Supp. at 860 (App. 395a). In November 1984, the Special Master and

^{*} Citations preceded by Resp. App. are to the Appendix annexed hereto.

the Board held meetings with and reviewed submissions from a number of interested persons, including class counsel, various individual plaintiffs' counsel and veterans' organizations. JA 13309-15; *see* Doc. 4563.*

Based on the work of the Advisory Board, Special Master Feinberg submitted to the court on February 27, 1985, a Report Pertaining to the Disposition of the Settlement Fund. JA 13308. The court held a hearing on the report on March 5, 1985 at which more than 40 witnesses appeared. *See, e.g.*, JA 14327. In May 1985, class counsel submitted objections to the report as well as an alternate distribution plan. Doc. 6109.

On May 28, 1985 the district court promulgated a plan for the distribution of the settlement fund which was largely that of the Special Master. The court rejected class counsel's proposed plan, which provided compensation only for class members with specified diseases. It reasoned that "no substantial evidence of causality exists as between . . . Agent Orange exposure and any given disease or medical problem" 611 F. Supp. 1396, 1408 (Pet. App. I at 42).** Under the court's plan, seventy-five percent of the settlement fund was to be paid to class members for nontraumatic death or total disability of veteran class members who were exposed to Agent Orange. *Id.* at 1410 (Pet. App. I at 53-54). Most of the remaining twenty-five percent was allocated to endow an independent foundation, to be governed by a court-appointed board of directors consisting primarily of Vietnam veterans, and to fund projects and services that would benefit the entire class. *Id.*

* Citations preceded by Doc. are to materials on record in the district court.

** Citations preceded by Pet. App. are to the Appendix submitted with this Petition.

On June 18, 1985 the court modified its January 7, 1985 order awarding attorneys' fees and expenses to class counsel and other plaintiffs' attorneys. On July 9, 1985, a final judgment was entered pursuant to Fed. R. Civ. P. 54(b), approving the settlement as fair, reasonable and adequate. Finally, on July 31, 1986 the district court entered a final judgment directing that the settlement fund be distributed in accordance with the court's May 28, 1985 order.

The Court of Appeals' Determinations on the Fairness of the Settlement, Its Negotiation and Distribution

a. Fairness of the Settlement

Various class members objected to the settlement and appealed. Upon review, the court of appeals also concluded that the settlement was fair, reasonable and adequate, and affirmed. 818 F.2d 145, 170-74 (App. 730a-38a). It noted that "pervasive factual and legal doubt . . . surrounds the plaintiffs' claims," *id.* at 149 (App. 681a), and determined, among other things:

- "[T]he weight of present scientific evidence does not establish that Agent Orange caused injury to personnel in Vietnam." *Id.* at 151 (App. 687a); *see id.* at 172 (App. 733a);
- "[T]he military contractor defense absolved [defendants] of any liability," *id.* at 151 (App. 687a); the government had as much knowledge as the defendants of the dangers of dioxin and the defendants did not breach any duty to warn the government since the alleged hazard is "wholly speculative" in light of the lack of scientific and medical proof of causation. *Id.* at 173-74 (App. 737a-38a);

- Plaintiffs faced substantial difficulty in proving details of exposure to Agent Orange since the relevant events occurred many years ago and “exposure through ingestion of water or food is a matter of considerable speculation.” *Id.* at 173 (App. 736a);
- Plaintiffs faced “formidable legal problems in establishing liability,” because the “substantive law of product liability varies from state to state, and the question of which state’s law would apply to a particular case is not easily answered.” *Id.* at 173 (App. 736a);
- Many plaintiffs’ claims would be barred by the applicable statute of limitations. *Id.* (App. 737a);
- It is “impossible to attribute the exposure of an individual to Agent Orange to the product of a particular company.” *Id.*; and
- Uncertainty existed whether plaintiffs could establish liability under their various legal theories. *Id.*

The court concluded “that all the plaintiffs in this litigation faced formidable hurdles. The settlement was therefore reasonable.” *Id.* at 174 (App. 738a).

b. *Negotiation Process, Post-Settlement Procedures and Distribution Plan*

The court of appeals also upheld the district court’s findings that the process of negotiations had been above-board and non-collusive, and that the post-settlement procedures employed by the court were in accord with settled law. *Id.* at 169-70 (App. 729a-30a).

In all but one respect, the court of appeals also affirmed the distribution plan, determining that it was reasonable and holding that the district court “was not obligated to adopt a plan [suggested by class counsel] that conformed

to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis." 818 F.2d 179, 183 (Pet. App. II at 16). The court overturned only that part of the plan intended to establish a class assistance foundation. It reasoned that distribution of any settlement proceeds to a largely independent foundation was improper, and that greater supervision by the court was required. *Id.* at 185-86 (Pet. App. II at 26-28). It said, however, that on remand the district court could provide for the distribution of this portion of the fund by "designat[ing] in detail [class assistance] programs and provid[ing] for their supervision." *Id.* at 186 (Pet. App. II at 30).

Finally, the court of appeals rejected an attack on the settlement based on class counsel's fee sharing agreement. The court concluded that, in light of "the grave weaknesses in plaintiffs' case," class counsel's fee sharing agreement "does not affect the instant settlement." 818 F.2d at 174 (App. 738a). In a separate opinion, the court did invalidate the agreement on the ground that it created impermissible incentives to settle early, and directed that class counsel's fees be distributed in accordance with the district court's fee awards. 818 F.2d 216, 218, 223-24 (Resp. App. A3, A15-16).

Reasons for Denying the Writ

Petitioner in this unique product liability class action seeks a writ to review the adequacy of the settlement, the propriety of the negotiation process and the correctness of certain post-settlement procedures. The writ should be denied for three equally sufficient reasons.

First, Petitioner fails to identify a single pertinent conflict in the circuits or with any decision of this Court. *See Sup. Ct. R. 17.*

Second, absent such a conflict, the Petition seeks nothing more than *de novo* factual review by this Court of the reasonableness of the settlement and the merits of plaintiffs' claims. But "jurisdiction [is] not conferred upon this [C]ourt merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); see *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). This Court confirmed only recently that appellate courts must "rely primarily on the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in the light of all the relevant circumstances." *Evans v. Jeff D.*, 475 U.S. 717, 106 S. Ct. 1531, 1545 (1986). And such a district court appraisal may not be disturbed absent "'a clear showing the District Court has abused its discretion'." 818 F.2d at 171 (App. 731a) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974)); see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

The district court here scrutinized the settlement in light of each of the nine factors set out in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974); see 597 F. Supp. at 761-62 (App. 177a-78a), giving particular emphasis to "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement," *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), cert. denied, 404 U.S. 871 (1971); see *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). It also evaluated the settlement negotiations to insure that the process had been aboveboard, at arm's length and non-collusive, and to insure that the interests of all class members had been adequately considered. 597 F. Supp. at 762 (App. 179a).

The court in a lengthy opinion then detailed a series of factual findings that formed the basis for its conclusion that the settlement was fair, reasonable and adequate to the class. Those findings and the district court's ultimate conclusions were approved by the court of appeals. *See, e.g.*, 818 F.2d at 171 (App. 733a) (the district court's "opinion sets out the various weaknesses of plaintiffs' case in great and persuasive detail"). In such circumstances, certiorari is unwarranted. *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("this Court has frequently noted its reluctance to disturb findings of fact concurred in [as here] by two lower courts").

Third and last, the *Agent Orange* class action litigation is "'*sui generis*' . . . involving an extraordinary constellation of facts, parties and pleadings." 725 F.2d 858, 860 (App. 669a) (quoting *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987, 995 (2d Cir. 1980) (Feinberg, C.J., dissenting), *cert. denied*, 454 U.S. 1128 (1981)). Even if the Petition could somehow be read to raise an issue otherwise worthy of the Court's attention, resolution of that issue would have acutely limited precedential value. In such circumstances, review by the Court is unwarranted. *See Milliken v. Bradley*, 433 U.S. 267, 298 (1977) (Powell, J. concurring) (writ improper given "unique circumstances" of case); *Rudolph v. United States*, 370 U.S. 269, 270 (1962) ("review would be of no importance save to the litigants themselves").

The writ should be denied.

I.

No Writ Should Issue to Review a Class Action Settlement Approved by Two Lower Courts Applying Concededly Correct Legal Principles and Based on Well-Founded Factual Determinations.

Petitioner contends that a writ should issue because the settlement was "grossly inadequate" (Pet. 54) and opposed by a majority of the class (Pet. 51); because the lower courts incorrectly assessed the merits of plaintiffs' case, specifically with regard to proof of causation and the viability of the military contractor defense (Pet. 55-62); and because the district court unilaterally altered the settlement agreement (Pet. 62).^{*} The contentions are not only unfounded, but redetermining them would necessarily engage the Court in *de novo* factual review. In such circumstances, certiorari is inappropriate.

A. Medical Causation

The central reality of this case is that even today, some 15-20 years after the fact, the scientific and medical evidence fails to establish that personnel in Vietnam were injured by exposure to Agent Orange. The district court reached this conclusion after an extensive and detailed an-

^{*} Petitioner also seeks review of the class certification order (Pet. at 35-39). His arguments attacking class certification fail totally to recognize that no trial of causation, liability, damages, or any other issue in a "mass accident" context occurred below. Rather, all claims were settled, and the issue decided below was not whether plaintiffs' claims *could have been tried* effectively as a class action, but whether the settlement before trial was fair and reasonable. See, e.g., *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Other reasons why Petitioner's request for a writ to review the class certification issues should be denied are set forth in the brief for Respondents in Opposition to the Petition in *Pinkney v. Dow Chemical Co.*, No. 87-437.

alysis of the applicable scientific and medical literature. 597 F. Supp. at 775-95 (App. 207a-47a); *see* 611 F. Supp. at 1230-34 (App. 498a-507a) (dismissing the claims of the *Agent Orange* opt-outs). As the district court observed, the logical and practical difficulty with plaintiffs' claims is that "all of the ailments and conditions class members allegedly suffer from, with the possible exception of chloracne, are not unique to Agent Orange or dioxin exposure and occur in the population at large," 597 F. Supp. at 819 (App. 302a), from a multitude of known and unknown etiologies, *id.* at 783, 817 (App. 223a, 296a). The record contains no evidence that the incidence of any of these diseases among the Agent Orange exposed population is greater than in the general population not exposed, or that establishes a causal connection between exposure to Agent Orange and any of the alleged adverse health effects. *Id.* at 782, 787-89, 817 (App. 221a, 231a-37a, 297a); 611 F. Supp. at 1239 (App. 518a).

The court of appeals agreed, determining that "[t]he weight of present scientific evidence thus does not establish that personnel serving in Vietnam were injured by Agent Orange." 818 F.2d at 172 (App. 733a). Both the Veterans Administration and Congress have reached identical conclusions. *See* 611 F. Supp. at 1234 (App. 506a) (citing H.R. Rep. No. 98-592, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4449, 4451); 38 C.F.R. § 3.311a(4)d.

Contrary to Petitioner's claim (Pet. 60-62), the district court did not unequivocally hold that medical causation in toxic tort cases can never be established without the use of epidemiological studies. Rather, the court observed that in the face of a number of "sound" and reliable epidemiological studies that address the effect of Agent Orange exposure on veterans' health and that furnish no support

for plaintiffs' claims, plaintiffs at trial would likely have suffered a directed verdict against them had they relied only on questionable studies concerning animal laboratory experiments and industrial accidents. 597 F. Supp. at 782-83 (App. 223a); 611 F. Supp. at 1231 (App. 499a).

Moreover, although Petitioner asserts that plaintiffs possessed "strong evidence of exposure" (Pet. 29), both lower courts found otherwise. The "events in question occurred many years ago, and exposure through ingestion of water or food is a matter of considerable speculation." 818 F.2d at 173 (App. 736a). The district court observed prophetically that "[n]o test . . . is decisive in proving exposure to Agent Orange, partly because . . . 'all of us have probably been exposed to dioxin at some time'." 597 F. Supp. at 782 (App. 222a-23a). A recently published study by the Centers for Disease Control indeed confirms that the levels of dioxin in the blood serum of approximately 700 selected Vietnam veterans were within the low "background" levels of the United States civilian population generally. Centers for Disease Control, *Serum Dioxin in Vietnam-Era Veterans—Preliminary Report*, 36 Morbidity and Mortality Weekly Reports 470 (1987). The veterans studied were selected based on their service in a military region known to have had a high number of defoliation missions. *Id.* at 471.*

The fact that there are more than 240,000 claimants against the fund does not demonstrate, as Petitioner con-

* Petitioner's description of a recent Veterans Administration mortality study (Pet. 29 n.17A) is misleading, and his suggestion that the study provides proof of plaintiffs' causation claims is false. The approximately 25,000 deceased Army and Marine Vietnam veterans who were the subject of that study did not exhibit an overall excess of cancer when compared to their counterparts who did not serve in Vietnam.

(footnote continued on following page)

tends, that the \$180 million settlement is "grossly inadequate on its face." (Pet., 25.) As the lower courts observed, "the existence of such a large number of claimants proves nothing," 818 F.2d at 171 (App. 732a), and has "little bearing on the question of how many claims have any merit." 611 F. Supp. at 1401 (Pet. App. I at 9-10). Many veterans appear to have filed claims "whether or not anything was wrong with them and whether or not any problems they may have could conceivably be related to Agent Orange exposure." *Id.*; see 818 F.2d at 171 (App. 732a). The settlement was approved as fair in principal part because of the "grave weaknesses" in plaintiffs' claims. 818 F.2d at 174 (App. 738a). Those weaknesses are unaffected by the aggregate number of those who choose to file a claim.

B. Military Contractor Defense

Both lower courts found that in the facts of this case the military contractor defense was a powerful one that provided the class with a strong reason for settlement. 818 F.2d at 173-74 (App. 737a-38a); 597 F. Supp. at 799 (App. 256a). The district court concluded that had the issue been put to a jury, "there is a substantial prob-

(footnote continued from preceding page)

The Marine subgroup of the study population did exhibit a statistically significant increase in mortality from lung cancer and non-Hodgkin's lymphoma. But no exposure data on individual veterans were available and, accordingly, the study did not investigate possible etiologic factors for those malignancies of greater incidence. The study did note, however, that dapsone, an anti-malarial drug, has been shown to cause lymphomas in laboratory animals; that dapsone was given mainly to troops stationed in I Corps; and that most of the Marines in Vietnam served in I Corps. Veterans Administration, Proportionate Mortality Study of Army and Marine Corps Veterans of the Vietnam War (1987) (unpublished; available from VA Office of Environmental Epidemiology, Washington, D.C. 20006-3868).

ability that defendants would prevail." 597 F. Supp. at 747 (App. 146a). In the court of appeals' view, the defense would have presented plaintiffs with "a final and . . . impossible, hurdle to surmount." 818 F.2d at 173 (App. 737a).

Further, the strength of the defense here neither derives from, nor is dependent upon, any particular formulation of its elements. Rather, its power in this case is a corollary of the fact that, "[e]ven today, the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam, even with regard to chloracne and liver damage." 818 F.2d 187, 190 (App. 755a). As the court of appeals explained in approving the settlement:

[W]e act on our belief that defendants clearly did not breach any duty to inform the government of hazards relating to Agent Orange. First, we agree with Chief Judge Weinstein that a reasonable trier of fact would have to have found that during the time when the defendants had a duty to inform the government of known hazards, the government had as much knowledge as the defendants of the dangers of dioxin, then relating largely to chloracne and a rare liver disease. . . . Second, we believe that the military contractor defense shields defendant contractors from liability where the hazard is wholly speculative. Even if this were a case in which causation was now clear and the issue was whether the hazard was known when Agent Orange was sold to the government, the plaintiffs would have difficulty establishing a breach of a duty to inform. Establishing such a duty on the facts here is impossible, however. In the light of hindsight, some 15 to 20 years after the fact, the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent

Orange, and there cannot have been a breach of an earlier duty to inform the government of known hazards.

818 F.2d at 173-74 (App. 737a-38a).

Here, of course, the class claims were settled, not tried. No jury was instructed on the military contractor defense, much less asked to make findings with respect to it. Nor did a circuit court overturn a plaintiff's verdict on the basis of the defense, as in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted*, 107 S. Ct. 872 (1987). Indeed, as of the May 7, 1984 settlement date the district court here had yet to publish its view of the form of the defense it later said it would have applied had the case gone to trial. *See* 597 F. Supp. at 847-50 (App. 364a-72a). The absence at settlement of a precise formulation of the defense, and of any definitive appellate ruling thereon, created uncertainty, making settlement "more desirable." *Id.* at 850 (App. 371a-72a).

More important here, perhaps, is that in the absence of sufficient evidence of causation, no *Agent Orange* plaintiff could have succeeded at trial on any claim of personal injury. To say, then, that defendants would probably have prevailed at trial on the military contractor defense is perhaps simply the obverse of saying that plaintiffs could not have met their burden of establishing that defendants' products had caused them harm and that defendants had breached some duty owed to them. In the circumstances, it is not surprising that the court of appeals held, in affirming the grant of summary judgment against the *Agent Orange* opt-outs, that it was not necessary to define the precise contours of the military contractor defense because "under any formulation, and regardless of which party bears the burden of proof, the defendants here were en-

titled to summary judgment." 818 F.2d at 192 (App. 761a).

This Court's decision to review the application of the military contractor defense in *Boyle v. United Technologies Corp.*, *supra*, provides no reason to grant the writ here. Whatever the Court's pronouncements in *Boyle* regarding the existence and elements of the military contractor defense, the medical and scientific evidence in this case will remain unchanged. And it is that evidence that served as the principal predicate for approval of the settlement by both courts below. Moreover, the military contractor defense is only one of numerous reasons both lower courts approved the settlement as fair. Petitioner's claim that the Second Circuit's approval of the settlement rests "solely" on the ground of the military contractor defense is frivolous. (Pet. 32). The Second Circuit noted with obvious approval that the district court's "opinion sets out the various weaknesses of plaintiffs' case in great and persuasive detail." 818 F.2d at 171 (App. 733a). The writ should be denied.

C. Alleged Class Opposition

Petitioner claims that the settlement was vehemently opposed by "a great majority of the class," thus warranting review by this Court. (Pet. 51). The claim is unsupported by the Record and premised solely on the self-serving estimates below of Petitioner's attorneys in this proceeding (Pet. 24 n.16). While the majority of the approximately 1,000 class members who made their views known to the court opposed the settlement, the responses were sharply divided. 597 F. Supp. at 761, 764-65 (App. 175a-76a, 183a-85a). More important, only a fraction of one percent of the class was heard from; "there was an overwhelmingly large silent majority," *id.* at 761 (App. 175a), that "remains inscrutable," *id.* at 775 (App. 207a). Many of those

who did object lacked "a full appreciation of the case's legal and factual problems and the mechanics of mass tort litigation." *Id.* at 759 (App. 172a).

Moreover, opposition to a settlement among members of the class "cannot serve as an automatic bar to a settlement that a district judge . . . determines to be manifestly reasonable." *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982). As the district court observed, class members "must, in the ultimate analysis, depend upon the court's impartiality and judgment." 597 F. Supp. at 761 (App. 176a). This view is consistent with settled law, including the cases relied upon by Petitioner. (Pet. 52-53).

D. No Unilateral Alteration of the Settlement Agreement

Petitioner's claim that the district court unilaterally altered the settlement agreement is incomprehensible. (Pet. 62-63). The settlement agreement contained no provisions regarding the content of the distribution plan. From defendants' point of view, the distribution plan was a matter primarily for the class, its attorneys and the court. As the court of appeals observed, the district court "was not obligated to adopt a plan [suggested by class counsel] that conformed to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis." 818 F.2d at 183 (Pet. App. II at 16). Given the lack of scientific knowledge sufficient to provide a factual basis for choosing or excluding any particular disease, the plan adopted by the district court was fair and reasonable, and the court of appeals so held. *Id.* at 184 (Pet. App. II at 19).

II.

**Petitioner's Attack on the Process of Negotiations
Raises Only Issues of Fact That Were Twice Resolved
in Respondents' Favor Below and Warrant No Review.**

Petitioner seeks a writ to review the process of negotiations. He contends that the \$180 million settlement was not freely negotiated by the parties. Rather, says Petitioner, the district judge dictated the settlement and imposed it on class counsel who were both disabled by conflicts of interest and ignorant of the number and nature of claims extant among class members. Petitioner's contention, however, is unsupported by the Record, was rejected by both courts below and raises only issues of fact warranting no review.

The settlement negotiations here extended over two months; involved every member of court-appointed class counsel; were overseen by three settlement masters; included the participation of the district judge only at the express request of class counsel and upon the prior agreement of all parties; and resulted in a \$180 million settlement of highly dubious claims. The impetus for the settlement was a recognition by class counsel on the eve of trial—after five years of extensive discovery that assured that class counsel was aware of the relative strengths and weaknesses of its case—of “the paucity of present evidence that Agent Orange injured the plaintiffs,” 818 F.2d at 172 (App. 734a), and the insurmountable hurdle of the military contractor defense. *Id.* at 173 (App. 737a).

The claim that the settlement was unfair because judicially coerced first surfaced in, and rests exclusively on, the February 23, 1985 oral, sworn statement of Benton Musslewhite, JA 13548-668 (Doc. 5600), counsel of record for Petitioner and a former member of class counsel.

Approximately one month earlier, the district court had awarded Mr. Musslewhite only a fraction of the attorney's fees he had sought as a member of class counsel, and published unflattering observations of his professional performance. JA 11744-45. A short time later, Mr. Musslewhite resigned from class counsel and moved on the basis of his oral sworn statement, pursuant to Fed. R. Civ. P. 59 and 60, to set aside the settlement.

That motion and one other similarly predicated were denied in open court on March 18, 1985 by the district court, which by implication flatly rejected the accuracy and import of Mr. Musslewhite's statement. JA 14460-64. The attack on the district judge's conduct was then reprised in the court of appeals, which likewise rejected it by implication as devoid of merit. *See* 818 F.2d at 170 (App. 729a) (rejecting as "totally frivolous" the class objectors' argument that the district judge "was *too* involved in [the settlement's] negotiation," but at the same time lacked sufficient knowledge of it to assess its reasonableness (emphasis in original)). Petitioner's contention that Mr. Musslewhite's self-serving account was "never contradicted" (Pet. 14) and warrants this Court's review is without merit.*

* Petitioner attempts to frame the issue as one involving a conflict between the conduct of the district court and certain well-settled principles regarding the court's role in mediating settlements. The cases cited by Petitioner, however, are inapposite. They do not address the scope of district court involvement in the negotiation process, but hold rather that in approving a settlement the district court cannot modify its terms. *See Plummer v. Chemical Bank*, 668 F.2d 654, 655-56 n.1 (2d Cir. 1982); *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1125 n.24 (7th Cir.), cert. denied, 444 U.S. 870 (1979); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

Nor should a writ issue to review class counsel's fee sharing agreement and its asserted adverse effect on the fundamental fairness and adequacy of the settlement. The district court here fully explored the agreement and found, based upon its "direct observation of counsel, the litigation and settlement negotiations," that "there is no reason to believe that the existence of [class counsel's] fee sharing agreement had any appreciable untoward effect on the decision to settle." 611 F. Supp. at 1461 (Resp. App. A41). Although on appeal the court of appeals invalidated the agreement, holding that it created impermissible incentives on the part of class counsel to settle, 818 F.2d at 218, 223-24 (Resp. App. A3, A15-16), the court declined to disturb the settlement. It observed, rather, that there were "grave weaknesses in plaintiffs' case," and found, in accord with the district court, that the agreement "does not affect the instant settlement." 818 F.2d at 174 (App. 738a). Review by the Court of this factual issue is unwarranted, particularly in view of the concurrent findings of the two lower courts. See *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

Petitioner contends that class counsel's lack of knowledge of the number and nature of claims demonstrates the "impropriety of negotiations" and makes clear that the settlement was the product of "uneducated guesswork." (Pet. 42-43.) But both lower courts here correctly concluded that class counsel's lack of hard information as to the number of claims reflects the absence of epidemiologic data favorable to plaintiffs and is a "sign of the weakness of the plaintiffs' case," and a fact that "supports rather than undermines the settlement." 818 F.2d at 171 (App. 732a); see 597 F. Supp. at 787-95 (App. 231a-47a) (summarizing epidemiologic data). Certainly no writ is appropriate to review the correctness of the lower courts' extensive review of the pertinent medical and scientific evidence.

III.

The Post-Settlement Procedures Employed by the District Court Were Wholly in Accord With Settled Law.

Petitioner contends that the courts of appeal's decisions regarding post-settlement procedures in class actions are "fuzzy, inconsistent and frequently in diametrical conflict" (Pet. 47); that the district court here failed to protect the post-settlement rights of class members (Pet. 44-45); and that, accordingly, this Court should grant certiorari and adopt for mass tort class actions certain "procedural absolutes" (Pet. 47) designed to protect the post-settlement rights of individual class members (Pet. 45).

There is, however, no pertinent conflict in the circuits and Petitioner fails even to point to one. No court has required the post-settlement procedures that Petitioner asks the Court to announce in this case. Here, moreover, the post-settlement procedures employed by the district court were wholly in accord with settled law, *see* 597 F. Supp. at 758-64 (App. 170a-83a), and displayed a scrupulous concern for the rights of all class members. The court of appeals so determined. 818 F.2d at 169-70 (App. 729a). Additionally, any pronouncement by this Court concerning post-settlement procedures in mass tort class actions will have limited precedential value because such cases have been and, in all likelihood, will continue to be rare. *See, e.g., id.* at 164-67 (App. 716a-23a). In such circumstances, the writ should be denied.

A. Pre-Notification Hearing

Petitioner claims that certiorari is warranted because the district court was required to hold a pre-notification hearing to determine the number and nature of claims, develop a distribution plan, and estimate the fees and charges against

the settlement fund. (Pet. 45-46). Only upon completion of that process, asserts Petitioner, and a determination by the district court that the settlement offer is “‘within the range’ of adequacy and reasonableness,” should the court proceed with settlement notice and fairness hearings. (Pet. 46).

The purpose of a pre-notification process and hearing, however, is “to avoid wasting time and money when a proposed settlement does not approach fairness.” 597 F. Supp. at 760 (App. 174a). There is no reason for the district court to hold a hearing when, as here, it has before it “sufficient facts intelligently to approve the settlement offer.” 818 F.2d at 170 (App. 729a). *See Manual For Complex Litigation, Second* § 30.44 at 241 (1985) (“initial assessment may be made on the basis of matters already known by the court” without a hearing). The district court here had carefully reviewed and analyzed much of the relevant scientific literature, *see* 597 F. Supp. at 747, 775-95 (App. 145a-46a, 207a-47a), “had closely followed the settlement negotiations,” *id.* at 760 (App. 174a), and “was thoroughly informed of the strengths and weaknesses of the parties’ positions,” 818 F.2d at 170 (App. 729a). It “implicitly found that the settlement was within the range of possible approval before notifying the class.” 597 F. Supp. at 760 (App. 174a). In such circumstances, no hearing was necessary, and Petitioner’s claim otherwise was rejected by the court of appeals as “totally frivolous.” 818 F.2d at 170 (App. 729a).

B. Settlement Notice

Petitioner also contends that a writ should issue to review the validity of the settlement notice. The notice was defective, he alleges, because among other things it failed to describe the plan of distribution. But, as the lower courts here recognized, 818 F.2d at 170 (App. 729a); 597

F. Supp. at 759-60 (App. 171a-74a), the purpose of a settlement notice is to apprise class members of the terms of the settlement and of the opportunity to present to the court objections and other matters the court might not consider in its evaluation of the fairness of the settlement. *Mendoza v. United States*, 623 F.2d 1338, 1348-49 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *Pearson v. Ecological Science Corp.*, 522 F.2d 171, 176-77 (5th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976) (quoting 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1797 at 234 (1972)).

The notice here contained both a general description of the settlement and a copy of the settlement agreement to "enhance communication with the class." 597 F. Supp. at 759 (App. 173a). As such, it complied fully with the well-settled requirements, *see id.* at 759-60 (App. 171a-74a), and the court of appeals so held, 818 F.2d at 170 (App. 729a).

Despite Petitioner's claim otherwise, there neither is, nor should be, an absolute requirement that the plan of distribution be formulated prior to notification of the class. *See* 818 F.2d at 170 (App. 729a); 597 F. Supp. at 763 (App. 182a); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982); *Manual For Complex Litigation*, Second § 30.212 at 226 n.58 (1985) ("[often . . . the details of allocation and distribution are not established until after the settlement is approved]"). As the court of appeals observed:

The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obliga-

tions of the defendants under the settlement agreement. The formulation of the plan in a case such as this is a difficult, time-consuming process. To impose [such] an absolute requirement . . . would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent [effectuation of a settlement]. Moreover . . . reversal of any significant aspect of the [distribution] plan on appeal . . . would require a remand for reconsideration of the settlement, followed by yet another appeal. There is no sound reason to impose such procedural straitjackets upon the settlements of class actions.

818 F.2d at 170 (App. 729a-30a).

Finally, Petitioner's assertion that the settlement notice must provide class members the right to opt out of the class after they have learned of the settlement terms (Pet. 47) is meritless. No "right" to opt out of the settlement, agreed to on May 7, 1984, existed after the Rule 23(b)(3) opt out period lapsed on May 1, 1984. 597 F. Supp. at 759 (App. 172a); *see Officers For Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 634-35 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *In re Four Seasons Secs. Laws Litigation*, 502 F.2d 834, 842-43 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974); Fed. R. Civ. P. 23(c)(3).*

* Petitioner's reliance (Pet. 49) on *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1082-83, 1091 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) and *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30, 32-33 (3d Cir. 1971), is misplaced. In each of those cases, certification followed settlement and the notice sent the class members was both a Rule 23(c)(2) and 23(e) notice. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1182 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979), a Title VII employment discrimination action, is similarly inapposite. That case involved a district court decree ordering injunctive relief and back pay to a newly created subclass, and provided members of the subclass with the right to opt out of the back pay award. The defendant unsuccessfully claimed that the decree, which was sent to some members of the class, constituted Rule 23(e) notice.

This rule "precludes 'sideline sitting' until after an adjudication and then 'one-way intervention' by the class member if the adjudication is favorable to the class"—a prior discredited practice precluded by the 1966 amendments to the Federal Rules of Civil Procedure. 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.55 at 23-429 (2d ed. 1987); 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1787 at 211 (2d ed. 1986).

Conclusion

For each of the reasons stated the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 30, 1987

Respectfully submitted,

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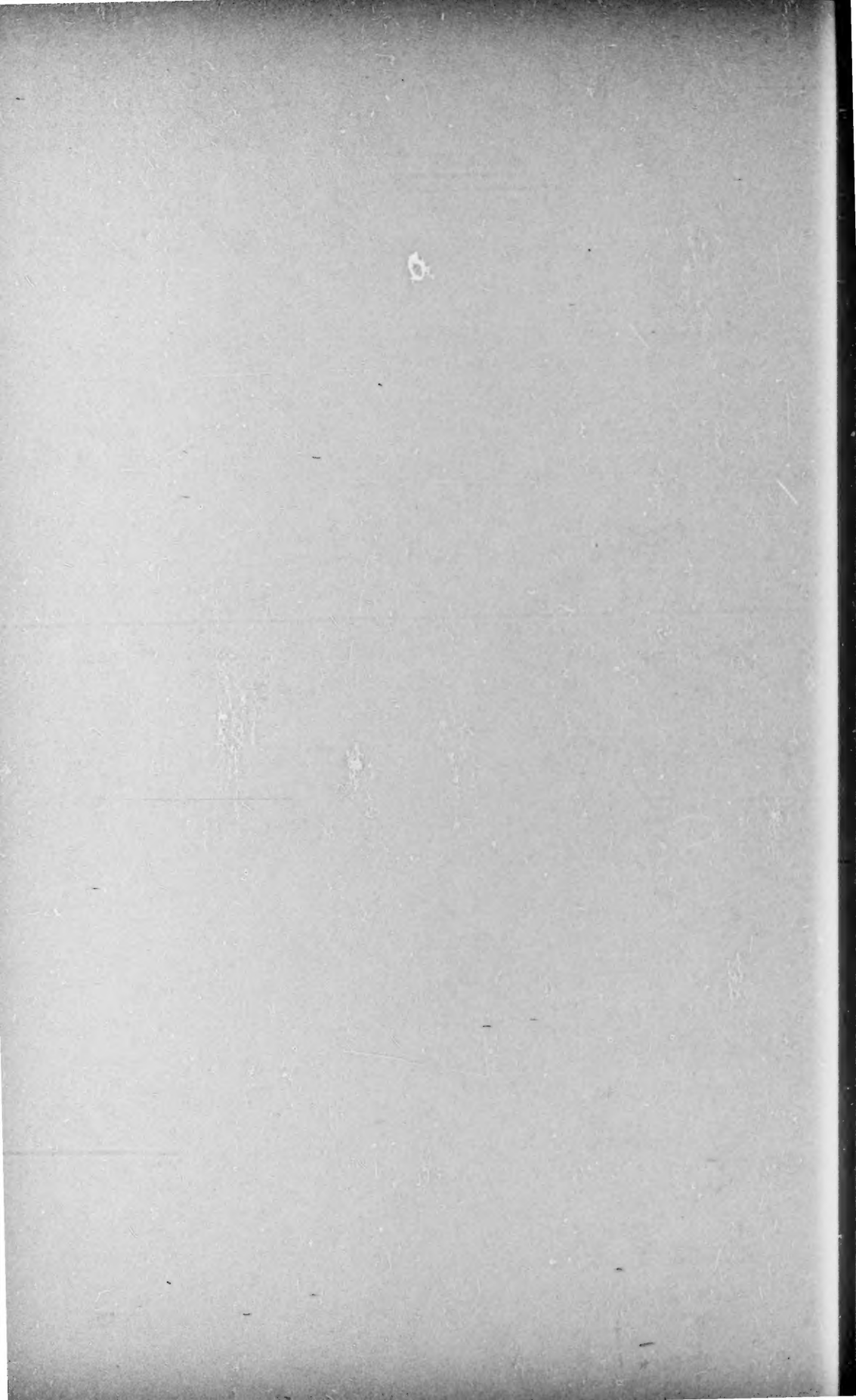
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APPENDIX



**Opinion of the United States Court of Appeals
for the Second Circuit**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1118—August Term, 1985

(Argued: April 10, 1986 Decided: April 21, 1987)

Docket No. 85-6365

IN RE

“AGENT ORANGE”

PRODUCT LIABILITY LITIGATION
(APPEAL OF DAVID DEAN)

Before:

VAN GRAAFEILAND, WINTER and MINER,
Circuit Judges.

Appeal from an order and judgment of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) denying appellant's motion to set aside fee sharing agreement under which members of Plaintiffs' Management Committee would receive, from the pool of fees awarded by the district court, a threefold return on funds advanced to the class for litigation expenses.

Reversed.

LEON FRIEDMAN, Hempstead, N.Y.
for Appellant Dean.

ELIHU INSELBUCH (Gilbert, Segall and Young, New York, N.Y. Richard B. Schaeffer, New York, N.Y., of Counsel) *for Appellee Agent Orange Plaintiffs' Management Committee.*

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MINER, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, 818 F.2d 145. This portion of the *Agent Orange* appeal concerns the district court's approval of a fee sharing agreement entered into by the nine-member Plaintiffs' Management Committee ("PMC") in December of 1983. Under the agreement, each PMC member who had advanced funds to the class for general litigation expenses was to receive threefold return on his investment prior to the distribution of other fees awarded to individual PMC members by the district court. In result, the agreement dramatically increased the fees awarded to those PMC members who had advanced funds to the class for expenses, and concurrently decreased the fees awarded to non-investing PMC members, who only performed legal services for the class.

David Dean, lead trial counsel for the plaintiff class and a non-investing member of the PMC, challenges the validity of the agreement, to which he was a signatory, contending that it violates DR 5-103 and DR 2-107(A) of the ABA Code of Professional Responsibility ("ABA Code"). The ABA Code provisions prohibit an attorney from acquiring a proprietary interest in an action in which he is involved and from dividing a fee with an attorney who is not a member of his firm, unless such division is made pursuant to client consent and is based upon services performed and responsibility assumed. In addition, Dean asserts that such an agreement, which premises the size of a fee on the amount advanced for expenses rather than on services rendered, violates the standards and principles developed in this circuit for the award of attorneys' fees in equitable fund class actions and inevitably places class counsel in a position at odds with the interests of the class itself.

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Although not informed of the existence of the fee sharing agreement until September of 1984, four months after the parties reached a settlement, the district court approved the agreement, holding that "there is no reason to believe that the existence of the PMC's fee-sharing agreement had any appreciable untoward effect on the decision to settle." *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1452, 1461 (E.D.N.Y. 1985) ("*Agent Orange I*"). In essence, the court determined that the substantial financial demands placed upon counsel in complex multi-party litigation require flexibility in reviewing internal fee sharing agreements so as not to discourage future representation of large plaintiff classes. At the same time, however, the district judge ruled that, in all future cases, counsel must notify the court of any fee sharing agreement *at the time of its inception*. In this way, according to the district judge, "the court at the outset can determine whether to permit the fee allocation agreement to stand before any attorney invests substantial time and funds." *Id.* at 1463.

Because we find that the agreement before us violates established principles governing awards of attorneys' fees in equitable fund class actions and creates a strong possibility of a conflict of interest between class counsel and those they were charged to represent, we reverse the district court's approval of the agreement. Accordingly, the fees originally allocated by the district court, based on the reasonable value of services actually rendered, will be distributed to the members of the PMC.

I. BACKGROUND

In September of 1983 Yannacone and Associates withdrew as attorneys for the class, claiming financial and management hardships. The district court then approved ap-

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pointment of the PMC as new class counsel. The PMC was comprised of these members—attorneys Stephen Schlegel, Benton Musslewhite and Thomas Henderson. *In re "Agent Orange" Product Liability Litigation*, 571 F.Supp. 481 (E.D.N.Y. 1983). In later months the district court approved the expansion of the PMC to encompass six additional members, including appellant David Dean. Dean, a member of the original panel of class counsel, had been closely involved with the Agent Orange litigation since its inception in 1979. In October of 1983 the district court appointed him to be the attorney responsible for leading the preparation and potential trial of plaintiffs' case.

In December of 1983, as a means of raising the capital necessary for the maintenance and continuation of the lawsuit, the nine PMC members entered into a written fee sharing agreement whereby six of the members each promised to advance the class \$200,000 for general litigation expenses. The agreement provided that the investing members would be reimbursed threefold from the pool of attorneys' fees awarded to PMC members upon successful completion of the action. The fees remaining in the pool after the investment pay-outs would be distributed pursuant to a fifty-thirty-twenty percent formula: fifty percent of the remainder would be distributed equally among the nine PMC members, thirty percent would be distributed according to the number of hours each member expended in the case, and twenty percent would be distributed in accordance with certain quality and risk factors relating to each PMC member's work in the action, as determined by a majority vote of the PMC. All PMC members, including Dean, signed the agreement. The district court, however, was not notified of its existence.

The action was settled in May of 1984 and the district court, by order dated June 11, 1984, notified counsel that

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petitions for attorneys' fees were to be submitted to the court no later than August 31, 1984. A hearing on the issue of fees was scheduled for late September. In ordering the hearing, the district court waived application of Rule 5 of the Local Rules of the Eastern District of New York requiring notice to the class of all fee applications *and fee sharing agreements* prior to the hearing on such fee petitions. The court gave as its reasons "the need for continued intensive work by the attorneys until the close of the fairness hearings and . . . the complexity of the fee applications." Notice of Proposed Settlement of Class Action, reprinted in *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 867 (E.D.N.Y. 1984). When the court waived application of the local rule, it was unaware of the PMC fee sharing agreement.

It was not until the PMC submitted its joint fee petition that the court finally learned of the agreement. At the September hearing on the fee petitions, the district judge expressed doubts as to the agreement's propriety and requested further briefing on the issue. Faced with the reservations expressed by the district judge, the PMC members modified their agreement in December of 1984. The revised agreement, and the one now before use, provided that five of the six investing members of the PMC each would advance an additional \$50,000 for general litigation expenses, bringing their total investments to \$250,000 each. In return for these advances, as well as for the \$200,000 advanced by the sixth investing member, the new agreement provided for the same threefold return as did the original agreement. The fifty-thirty-twenty percent formula for the distribution of the remaining portion of the fees, however, was eliminated. In its place, the revised agreement called for the remainder to be distributed *pro rata* to each PMC member "in the proportion the individual's and/or firm's

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fee award bears to the total fees awarded.”¹ *Agent Orange I*, 611 F.Supp. at 1454.

On January 7, 1985, the district court issued a Memorandum and Order awarding over \$10 million in fees and expenses to the various counsel whose work had benefitted the class, applying the principles of fee distribution in equitable fund actions set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (“*Grinnell I*”) and *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) (“*Grinnell II*”). *In re “Agent Orange” Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. 1985) (“*Agent Orange II*”). As later amended and supplemented, the district court’s decision awarded over \$4.7 million in

¹ The agreement, in pertinent part, provided as follows:

When and if funds are received, either by the AOPMC or individual members thereof, the first priority distribution will be to distribute to Messrs. Brown, Chesley, Henderson, Locks, O’Quinn and Scharwtz, an amount equivalent to the actual monies expended for which these six signatories were responsible toward the common advancement of the litigation up to \$250,000.00 with a multiplier of three (i.e., none of these six individuals will receive more than \$750,000 each), which shall be paid to them for having secured the funds for the AOPMC and to Messrs. Dean, Schlegel and Musslewhite an amount equivalent to the actual monies expended by these three signatories toward the common advancement of litigation up to \$50,000.00 with a multiplier of three (i.e., none of these three signatories will receive more than \$150,000.00 each). Any additional expenses will be reimbursed without a multiplier as ordered by the Court. All of the expenses plus the appropriate multiplier will be deducted from the total fees and expenses awarded by the Court to all of the AOPMC firms. The remaining fees will then be distributed pro rata to each signatory in the proportion the individual’s and/or firm’s fee award bears to the total fees awarded.

In re Agent Orange Product Liability Litigation, 611 F.Supp. 1452, 1454 (E.D.N.Y. 1985) (quoting Revised Fee-Sharing Agreement, Dec. 13, 1984).

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fees to the nine members of the PMC on an individually apportioned basis. David Dean, due to his lengthy involvement in the class action and the exceptional quality of his work, was awarded \$1,424,283.75, or over thirty percent of all fees awarded to the PMC. Each of the six investing members of the PMC was awarded a much lower percentage of the entire PMC fee award, with one investor being awarded only \$41,886. The highest award to an investor was \$515,163.

Once the fee sharing agreement was applied to these awards, however, the amount of fees each PMC member was to receive changed dramatically. In Dean's case, application of the agreement reduced his award to \$542,310, a reduction of \$881,973. In contrast, Newton Schwartz, an investing member of the PMC to whom the district court awarded \$41,886, was now to receive \$513,026, equivalent to an hourly rate of \$1,224.81. The awards to all other investing members were similarly enhanced and, in turn, the awards to the two other non-investing members were diminished, resulting in a distortion of the district court's individual PMC member fee awards. The total of all fees awarded by the court to the members of the PMC, of course, remained unchanged.²

In May of 1985, Dean moved in the district court to overturn the fee sharing agreement, claiming that it violated professional ethics and did not protect the rights of the class. In a Memorandum and Order issued June 27, 1985, the court denied Dean's motion and upheld the agreement, albeit with some reluctance. The court found, as a factual

² The effect of the fee sharing agreement on the district court's fee awards to the individual PMC members is shown by the following chart.

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matter, that no conflict of interest had arisen in the litigation from the fee sharing agreement and, consequently, that the interests of the class in obtaining a fair and reasonable settlement had not been impinged. *Agent Orange I*, 611 F.Supp. at 1461. Initially, the court recognized its obligation to review the agreement in its capacity as protector of the rights of the plaintiff class. It then went on to examine the propriety of the agreement under DR 2-107(A) and DR 5-103 of the ABA Code and the practical effect on the agreement on the PMC's representation of the class.

As to the DR 2-107(A), which prohibits an attorney from splitting his fee with another attorney not of the same firm unless he has the consent of his client and the "division is made in proportion to the service performed and responsibility assumed by each," the court determined that the PMC should be viewed as an *ad hoc* law firm "formed for the purpose of prosecuting the Agent Orange multidistrict litigation," *Agent Orange I*, 611 F.Supp. at 1458. The court reasoned that the business realities of the litigation required the PMC to be able to perform those functions

(footnote continued from preceding page)

	<i>Amount of Fees Awarded by District Court</i>	<i>Amount of Fees Awarded Under the Agreement</i>	<i>Net Effect of the Agreement</i>
Dean (noninvestor)	\$1,424,283	\$542,310	—\$881,973
Schlegel (noninvestor)	\$944,448	393,312	— 549,136
Musslewhite (noninvestor)	344,657	206,991	— 137,666
Schwartz (investor)	41,886	513,026	+ 471,140
O'Quinn (investor)	132,576	541,128	+ 408,552
Brown (investor)	348,331	608,162	+ 259,831
Locks (investor)	487,208	651,339	+ 164,171
Chesley (investor)	475,080	647,534	+ 172,456
Henderson (investor)	515,163	659,975	+ 144,812

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ordinarily performed by actual law firms, such as splitting fees among its members. The district court also noted that the Model Rules of Professional Conduct ("Model Rules") adopted by the ABA in 1983, although not adopted in New York, reflect "an increased recognition" of these business realities by permitting fee sharing agreements based upon services rendered *or* upon written acceptance of joint responsibility by the attorneys if the client is advised of the participation and does not object and the total fee is reasonable. Model Rule 1.5(e). Recognizing the practical problem of client consent in class actions, however, the district court concluded that its duty to protect the rights of the class ordinarily could not be performed unless the attorneys involved notified the court of the existence of such an agreement "as soon as possible," *Agent Orange I*, 611 F.Supp. at 1459.

As to DR 5-103, which prohibits an attorney from acquiring a proprietary interest in an action in which he is involved, the court found that the investing members acquired no independent interest in the action because the financial return from any initial advance for expenses was to be paid from the fees otherwise awarded to the PMC members, and thus would not affect the class fund. While the court did recognize that a conflict of interest could arise from such an agreement, it cautioned that complex class actions require a more sophisticated analysis of ethical codes than ordinary two-party cases in order not to "unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class." *Id.* at 1460. Accordingly, the district court held that a case-by-case analysis of such fee sharing agreements to identify potential conflicts of interest should be adopted.

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The court conceded that an agreement of the sort before it conceivably could create an interest on the part of the investors to settle early, regardless of the benefit to, or interest of, the class. This is because an attorney whose fee is based upon the amount of funds advanced for expenses in an action will receive the same fees "whether the case is settled today or five years from now." *Id.* The court reasoned, however, that any possible interest to settle early would have been offset by the theoretical incentive to extend such litigation created by the lodestar formula and concluded that, as a factual matter, no conflict had arisen here.

The court then set forth five additional, though nondispositive, reasons for approving the agreement. First, the returns on the investments did not affect the class fund, since they were paid from the fee awards of PMC members. Second, the court recognized that the "business" of law will at times require creative, yet ethical, methods for economical and efficient operation. Third, without the funds advanced by the PMC members, it was possible that the litigation would have collapsed and neither the attorneys nor the class would receive any payments. Fourth, the court noted that the PMC members could have earned substantial returns, though not quite threefold, on these same funds if they had undertaken more traditional investments. Fifth, if the PMC members had received the amount of fees requested in their joint petition, nearly thirty million dollars, the extent of the distortion of the fees by the investment agreement would have been insubstantial.

In sum, the district court determined that the practical needs of this form of litigation required an inventive method of fund raising in order to guarantee effective representation of class rights. At the same time, however, it labeled as "troubling" the PMC's failure to inform the court of the

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existence of the agreement until months after a settlement had been reached. *Id.* at 1462. In light of class counsel's fiduciary obligations to the class and the court's role as guardian of class rights in relation to settlement review, the district court found that both the class and the court had a right to be notified of the existence of such an agreement. To this end, the court proclaimed that in all future cases, class counsel would be obligated to make the existence of a fee sharing agreement known to the court at the time of its formation.

II. DISCUSSION

Dean's appeal presents an issue of first impression: whether an undisclosed, consensual fee sharing agreement, which adjusts the distribution of court awarded fees in amounts which represent a multiple of the sums advanced by attorneys to a class for litigation expenses, satisfies the principles governing fee awards and is consistent with the interests of the class.

At the outset, we note that the fees in this case were awarded pursuant to the equitable fund doctrine, first set forth in *Trustees v. Greenough*, 105 U.S. (15 Otto) 527, 26 L.Ed. 1157 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885). The underlying rationale for the doctrine is the belief that an attorney who creates a fund for the benefit of a class should receive reasonable compensation from the fund for his efforts. *Central Railroad*, 113 U.S. at 125. Because the calculation of fees necessarily will affect the funds available to the class, this circuit has adopted a lodestar formula for fee computation. *Grinnell II*, 560 F.2d at 1099; *Grinnell I*, 495 F.2d at 471. The lodestar seeks to protect the interests of the class by tying fees to the "actual

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effort made by the attorney to benefit the class.” *Grinnell II*, 560 F.2d at 1099. Accordingly, fees are calculated by taking the number of hours reasonably billed and multiplying that figure by an hourly rate “normally charged for similar work by attorneys of like skill in the area.” *Id.* at 1098. Once calculated, the court may, in its discretion, increase or decrease this figure by examining such factors as the quality of counsel’s work, the risk of the litigation and the complexity of the issues. *Id.* Discretion to adjust the lodestar figure upward because of superior quality, however, is limited to exceptional situations and must be supported by “specific evidence” and “detailed findings” by the district court. *Pennsylvania v. Delaware Valley Citizens’ Council for Clear Air.* — U.S. —, 106 S.Ct. 3088, 3098, 92 L.Ed.2d 439 (1986). Adherence to these principles is essential not only to avoid awarding windfall fees to counsel, but also to “avoid every appearance of having done so,” *Grinnell I*, 495 F.2d at 469.

Of equal importance to our analysis is Fed.R.Civ.P. 23(e), which requires court approval of any settlement of a class action suit and squarely places the court in the role of protector of the rights of the class when such a settlement is reached and attorneys’ fees are awarded. *Grinnell II*, 560 F.2d at 1099. In fulfilling this role, courts should look to the various codes of ethics as guidelines for judging the conduct of counsel. *Agent Orange, I*, 611 F.Supp. at 1456. In addition, where only retrospective review of counsel’s conduct is available, courts should not be limited to an examination of the actual effects of such conduct on the litigation, but rather, as the ABA Code and *Grinnell I* imply, the appearance and potential effect of the conduct should be reviewed as well. *See Grinnell I*, 495 F.2d at

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469; ABA Code of Professional Responsibility Canon 9 (1975).

The ultimate inquiry, therefore, in examining fee agreements and setting fee awards under the equitable fund doctrine and Fed.R.Civ.P. 23(e), is the effect an agreement could have on the rights of a class. Because we find that the agreement here conflicts substantially with the principles of reasonable compensation in common fund actions set forth in *Grinnell I* and *Grinnell II*, and that it places class counsel in a potentially conflicting position in relation to the interests of the class, we reverse.

Initially, it is beyond doubt that the agreement, by tying the fee to be received by individual PMC members to the amounts each advanced for expenses, completely distorted the lodestar approach to fee awards. In setting fees here, the district judge meticulously examined counsel's fee petitions in accordance with the *Grinnell* decisions and arrived at individual awards for each PMC member based upon the services that each had provided for the class. By providing for threefold returns of advanced expenses, however, the agreement vitiated these principles. The distortion was so substantial as to increase the fees awarded to one investor by over twelve times that which the district judge had determined to be just and reasonable, and, in a second case, to decrease the otherwise just and reasonable compensation of a non-investor by nearly two-thirds.

There is authority for a court, under certain circumstances, to award a lump sum fee to class counsel in an equitable fund action under the lodestar approach and then to permit counsel to divide this lodestar-based fee among themselves under the terms of a private fee sharing agreement. *E.g.*, *Ruskay v. Jensen*, No. 71-3169, slip op. at 10-13 (S.D.N.Y. Sept. 18, 1981); *In re Magic Marker*

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Securities Litigation, [1979 Transfer Binder] Fed.Sec.L. Rep.(CCH) ¶ 97,116, at 96,195 (E.D.Pa. Sept. 16, 1979); *Valente v. Pepsico, Inc.*, [1979 Transfer Binder] Fed.Sec.L.Rep (CCH) ¶ 96,921, at 95,863 (D.Del. June 4, 1979), *appeal dismissed*, 614 F.2d 772 (3d Cir. 1980); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C.1978); *Del Noce v. Delyar Corp.*, 457 F.Supp. 1051, 1055 (S.D.N.Y.1978). We reject this authority, however, to the extent it allows counsel to divide the award among themselves in *any* manner they deem satisfactory under a private fee sharing agreement. Such a division overlooks the district court's role as protector of class interests under Fed.R.Civ.P. 23(e) and its role of assuring reasonableness in the awarding of fees in equitable fund cases. *See Kamens v. Horizon Corp.*, [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 98,007, at 91,218 & n. 4 (S.D. N.Y. May 26, 1981); *Steiner v. BOC Financial Corp.*, [1980 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,656, at 98,490 (S.D.N.Y. Oct. 10, 1980); *cf. Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884 (2d Cir. 1983) ("if the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims"), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984). In addition, this approach overlooks the class attorneys' "duty . . . to be sure that the court, in passing on [the] fee application, has all the facts" as well as their "fiduciary duty to the . . . class not to overreach." *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980).

A careful examination of those decisions permitting internal fee sharing agreements to govern the distribution of fees reveals no case where return on investment was a factor. More important, in a number of those cases the

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courts apparently assumed that the internal fee sharing agreement would be based substantially on services rendered by individual counsel. *E.g.*, *Ruskay*, slip op. at 14 n.4 ("Since the court has satisfied itself that the proposed distribution will not result in compensation beyond services performed, it declines to overrule the agreement."); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. at 400 ("Since the fee application purports to be based upon the rates and time spent by the several attorneys, it is presumed that these factors also weigh heavily in this internal agreement.").

Accordingly, while the practice of allowing class counsel to distribute a general fee award in an equitable fund case among themselves pursuant to a fee sharing agreement is unexceptional, we find that any such agreement must comport essentially with those principles of fee distribution set forth in *Grinnell I* and *Grinnell II*. This does not mean that a fee sharing agreement must replicate the individual awards made to PMC members under the district court's lodestar analysis. Even after the court makes the allocation, the attorneys may be in a better position to judge the relative input of their brethren and the value of their services to the class. *See In re Ampicillin Antitrust Litigation*, 81 F.R.D. at 400. Nor does this mean that class counsel need follow, line by line, the lodestar formula in arriving at an agreement as to fee distribution. Obviously, the needs of large class litigation may at times require class counsel, in assessing the relative value of an individual attorney's contribution, to turn to factors more subjective than a mere hourly fee analysis. It does mean that the distribution of fees must bear some relationship to the services rendered.

In our view, fees that include a return on investment present the clear potential for a conflict of interest between

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class counsel and those whom they have undertaken to represent. "[W]henever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur." *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978). The concern is not necessarily in isolating instances of major abuse, but rather is "for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *Court Awarded Attorney Fees*, Report of the Third Circuit Task Force, 108 F.R.D. 237, 266 (Oct. 8, 1985). Such conflicts are not only difficult to discern from the terms of a particular settlement, but "even the parties may not be aware that [they exist] at the time of their [settlement] discussions," *id.* This risk is magnified in the class action context, where full disclosure and consent are many times difficult and frequently impractical to obtain. *In re Mid-Atlantic Toyota Antitrust Litigation*, 93 F.R.D. 485, 490-91 (D.Md.1982); *Gould v. Lumonics Research Ltd.*, 495 F.Supp 294, 297 n.6 (N.D.Ill. 1980).

The district court recognized that the agreement provided an incentive for the PMC to accept an early settlement offer not in the best interests of the class, because "[a]n attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now." *Agent Orange I*, 611 F.Supp. at 1460. Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged. Unlike the district court, however, we conclude that the risk of such an adverse effect on the settlement process provides adequate

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grounds for invalidating the agreement as being inconsistent with the interests of the class. The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation. The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement.

The district court's factual finding, that the adequacy of the settlement demonstrated that the agreement had no effect on the PMC's conduct, is not dispositive. The district court's retrospective appraisal of the adequacy of the settlement cannot be the standard for review. The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed. Review based on a fairness of settlement test would not ensure the protection of the class against potential conflicts of interest, and, more important, would simply reward counsel for failing to inform the court of the existence of such an agreement until after a settlement.

We also reject the district court's finding that its authority to approve settlement offers under Fed.R.Civ.P. 23(e) acts to limit the threat to the class from a potential conflict of interest. At this late stage of the litigation, both class counsel and defendants seek approval of the settlement. The court's attention properly is directed toward the overall reasonableness of the offer and not necessarily to whether class counsel have placed themselves in a potentially con-

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flicting position with the class. It would be difficult indeed for a court at this stage to hold that, regardless of the terms of the settlement, class counsel had not fulfilled its obligation to the class. Given this focus and other administrative concerns that may come to bear, we find the approval authority, in this context, to be insufficient to assure that the ongoing interests of the class are protected. See *Alleghany Corp. v. Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (at this stage of litigation, "[a]ll the dynamics conduce to judicial approval of such settlements"), *cert. dismissed*, 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335 (1966); *In re Mid-Atlantic Toyota Antitrust Litigation*, 93 F.R.D. at 491 (court authority to review settlement offers not adequate to safeguard against dangers of conflict of interest); Coffee, *The Unfaithful Champion: The Plaintiff As Monitor In Shareholder Litigation*, 48 Law & Contemp. Probs. 5, 26-27 (Summer 1985) (judicial review not a significant barrier to collusive settlements).

Equally unpersuasive is the district court's determination that the potential incentive to settle early is offset by an incentive, fostered by the lodestar formula, to prolong the litigation. While a number of commentators have asserted that use of the lodestar formula encourages counsel to prolong litigation for the purpose of billing more hours, e.g., Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limit of Proportional Discipline*, 47 Law & Contemp. Probs. 293, 302 (Winter 1984), the formula's effect in this regard is far from clear, see Coffee, *supra*, at 34-35 ("the claim that the lodestar formula results in excessive fees is nonetheless a red herring"); Mowrey, *Attorneys Fees In Securities Class Action and Derivative Suits*, 3 J.Corp. Law. 267, 343-48 (1978) (attorneys' fees awards by district courts have not risen since adoption of lodestar analy-

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sis); see also 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1803, at 508 (1986) (no empirical data show any incidence of district courts awarding excessive fees). Moreover, the court's authority in reviewing fee petitions and approving or disapproving hours billed in an equitable fund action works as a substantial and direct check on counsel's alleged incentive to procrastinate. *In re Equity Funding Corporation of America Securities Litigation*, 438 F.Supp. 1303, 1328 (C.D.Cal. 1977); 7B C. Wright, A. Miller & M. Kane, *supra*, § 1803, at 511. Consequently, we do not view the lodestar system as countervailing the clear interest in early settlement created by the private agreement.

Additionally, potential conflicts of interest in class contexts are not examined solely for the actual abuse they may cause, but also for potential public misunderstandings they may cultivate in regard to the interests of class counsel. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 95 (7th Cir. 1977); *Prandini v. National Tea Co.*, 557 F.2d 1015, 1017 (3d Cir. 1977). While today we hold that the settlement reached here falls within that range of reasonableness permissible under Fed.R.Civ.P. 23(e), we are not insensitive to the perception of many class members and the public in general that it does not adequately compensate the individual veterans and their families for whatever harm Agent Orange may have caused. To be sure, the settlement does not provide the individual veteran or his family substantial compensation. Given the facts of this settlement, the potentially negative public perception of an agreement that awards an investing PMC member over twelve times the amount the district court has determined to be the value of his services to the class provides additional justification for invalidating the agreement and applying the lodestar formula.

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We find the various additional rationales for approving the fee sharing agreement set out in the district court's decision equally unpersuasive. First, the fact that the returns on the advanced expenses did not directly affect the class fund is of little consequence, since we have already determined that the district court's responsibility under *Grinnell I* and *Grinnell II*, as well as under Fed.R.Civ.P. 23(e), goes beyond concern for only the overall amount of fees awarded and requires attention to the fees allocated to individual class counsel. Second, while we sympathize with counsel regarding the business decisions they must make in operating an efficient and manageable practice and agree that a certain flexibility on the court's part is essential, we are not inclined to extend this flexibility to encompass situations in which the bases for awarding fees in an equitable fund action are so clearly distorted. Third, whether this class action would have collapsed without an agreement calling for a threefold return is a matter of speculation. Any such collapse, however, would have been due to the pervasive weaknesses in the plaintiffs' case. Fourth, we find wholly unconvincing the district court's suggestion that the investors could have made a sizeable return on their funds if they had invested them in other ventures. We take notice of the fact that a threefold return on one's money is a rather generous return in any market over a short period of time. Fifth, while the effect of this fee sharing agreement might have been dwarfed to the point of insignificance if the fees awarded to counsel had been much greater, this simply is too speculative to defend the agreement as not affecting the interests of the class. Finally, we do not find class counsel to have formed an *ad hoc* partnership. They merely are a group of individual lawyers and law firms associated in the prosecution of a single law-

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suit, and they lack the ongoing relationship that is the essential element of attorneys practicing as partners.

We do agree with the district court's ruling that in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed to the rights of the class. Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising, either by disapproving improper agreements or by reshaping them with the assistance of counsel to conform more closely with the principles of *Grinnell I* and *Grinnell II*. In the present case, however, where the district court was not made aware of the agreement, and the potential for a conflict of interest arising was substantial, the adoption of a rule for future cases in no way alleviates the fatal flaws of this agreement and does not offset the need for its invalidation.

Although appellant Dean is successful on this appeal, his conduct has been far from praiseworthy. He freely consented to the formation of the agreement in December of 1983 and later to its revision in 1984. He did not even inform the district court of the existence of the agreement or of his objections to it until long after the settlement was reached. If he had called the agreement into question immediately, a great deal of time and expense could have been saved.

III. CONCLUSION

Having determined that the fee sharing agreement violates the principles for awarding fees in an equitable fund action and places class counsel in a position potentially in conflict with the interests of the class which they represent, we reverse. We award all the PMC members the fees to which the district court determined they were entitled.

Opinion of the District Court (Weinstein, J.)
Dated June 27, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
MDL No. 381

IN RE

"AGENT ORANGE"

Product Liability Litigation

MICHAEL F. RYAN, et al.,

Plaintiffs,

v.

DOW CHEMICAL COMPANY, et al.,

Defendants.

STEPHEN J. SCHLEGEL, et al.,

Petitioners,

v.

DAVID J. DEAN,

Respondent.

Elihu Inselbuch and Richard B. Schaeffer, Gilbert, Segall and Young, New York City, for respondent-petitioner Majority of the Agent Orange Plaintiffs' Management Committee, consisting of Stephen J. Schlegel, Schlegel & Trafelet, Ltd., Chicago, Ill., Thomas Henderson, Henderson & Goldberg, Pittsburgh, Pa., Phillip E. Brown, Hoberg, Finger,

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Brown, Cox & Molligan, San Francisco, Cal., Stanley Chesley, Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio, John Q. O'Quinn, O'Quinn & Hagans, Houston, Tex., Neil R. Peterson and Gene Locks, Greitzer & Locks, Philadelphia, Pa., Newton B. Schwartz, Houston, Tex., former member Benton Musslewhite, Law Offices of Benton Musslewhite, Inc., Houston, Tex.

Leon Friedman, Hempstead, N.Y., for movant-respondent David J. Dean, Dean, Falanga and Rose, Carle Place, New York.

MEMORANDUM and ORDER

WEINSTEIN, Chief Judge:

David J. Dean, Esq., a member of the Agent Orange Plaintiffs' Management Committee ("PMC"), has moved to set aside the PMC's agreement to pay certain committee members a 300 percent return of funds they advanced to finance the litigation. The payment would be made out of all the fees awarded to the PMC attorneys by the court. The other PMC members oppose the motion and seek to compel arbitration. For reasons indicated below, Mr. Dean's motion is denied and the petition to compel arbitration is dismissed.

The issues raised by Mr. Dean's motion present new and difficult questions in the financing of major toxic tort litigations. Implicated are the boundaries of legal ethics and the legality of fee arrangements among attorneys in class actions. The instant attorneys' agreement for fee distribution will not be set aside. In any future case in this district such an agreement must be revealed to the court and members of the class as soon as possible. A "sunshine"

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rule is essential to protect the interests of the public, the class and the honor of the legal profession.

I. FACTS

In 1979 cases began to be transferred to this district for consolidation of pretrial proceedings in the Agent Orange multidistrict litigation. In 1980 the court tentatively certified a class and appointed Yannacone and Associates, a consortium of local lawyers, as class attorneys. Yannacone and Associates withdrew as class counsel in September 1983 because of management problems and lack of financing. They were replaced by Stephen J. Schlegel, Benton Musslewhite, and Thomas W. Henderson. Mr. Schlegel and Mr. Henderson are members of the current PMC. Mr. Musslewhite resigned in February 1985 but still considers himself bound by the PMC fee sharing agreement.

David Dean, a member of the original management committee, remained associated with the new committee. At pretrial conferences after October 1983 the court indicated that he would be expected to take the lead in preparing and trying the case. In February 1984 the court at the PMC's request approved an expansion of its membership to include Mr. Dean and other lawyers who previously had been working informally with class counsel.

The class action was settled in May 1984 on the eve of trial. Attorney fee applications were required to be submitted by the end of August 1984. The PMC submitted a joint fee award application. Only then was the court apprised of the existence of an internal management agreement among the PMC lawyers that set out the procedure for allocation of any fees awarded from a class recovery. Its provisions called for (1) a 300% return of funds ad-

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vanced by certain PMC members before any other distribution, and (2) division of the remainder of the award as follows: 50% in equal shares among all committee members, 30% in proportion to hours worked, and 20% based on factors paralleling those considered by courts in granting fee award multipliers.

After the court voiced serious doubt about the legality and propriety of this arrangement at the September 26, 1984 attorney fee hearing, the PMC members renegotiated their fee-sharing agreement. The new arrangement still requires a three-fold reimbursement of monies advanced, but the remainder of the fee awards would be allocated to those who were awarded them by the court. This renegotiated agreement, entered into on December 13, 1984, is retroactive to October 1, 1983. It provides in pertinent part as follows:

When and if funds are received, either by the AOPMC or individual members thereof, the first priority distribution will be to distribute to Messrs. Brown, Chesley, Henderson, Locks, O'Quinn and Schwartz, an amount equivalent to the actual monies expended for which these six signatories were responsible toward the common advancement of the litigation up to \$250,000.00 with a multiplier of three (*i.e.*, none of these six individuals will receive more than \$750,000.00 each), which shall be paid to them for having secured the funds for the AOPMC and to Messrs. Dean, Schlegel and Musslewhite an amount equivalent to the actual monies expended by these three signatories toward the common advancement of the litigation up to \$50,000.00 with a multiplier of three (*i.e.*, none of these three sig-

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natories will receive more than \$150,000.00 each). Any additional expenses will be reimbursed without a multiplier as ordered by the Court.

All of the expenses plus the appropriate multiplier will be deducted from the total fees and expenses awarded by the Court to all of the AOPMC firms. The remaining fees will then be distributed *pro rata* to each signatory in the proportion the individual's and/or firm's fee award bears to the total fees awarded.

The agreement also provides for mandatory arbitration of "[a]ny dispute concerning monies due a member [of the PMC] or his rights under this agreement."

Messrs. Brown, Chesley, Locks, O'Quinn and Schwartz each have advanced \$250,000. Mr. Henderson has contributed a total of \$200,000. The remaining three PMC members have not advanced any funds for general expenses, although they have incurred individual expenses, for which they will be individually reimbursed. *See In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985).

According to Mr. Dean, the agreement will be interpreted to reach the results indicated in the following table taken from his motion papers. The figures given are based on the fees awarded in the January 7, 1985 order rather than the somewhat higher awards ultimately allowed on reconsideration. *See In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. January 7, 1985, as modified June 18, 1985). Nevertheless, the general fee-shifting effect shown by the table remains essentially the same. Those who

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advanced money would be advantaged over those who gave time and skill to the enterprise.

	<i>Court Awarded Fees</i>	<i>Net Fees Under Agreement</i>	<i>Gain Or Loss</i>	<i>Court Awarded Rate</i>	<i>Net Hourly Rate</i>
BROWN	296,493.75	551,157.19	+ 254,663.44	225.00	418.26
WHESLEY	390,993.75	567,476.19	+ 176,482.44	225.00	326.56
HENDERSON	442,552.50	576,358.26	+ 133,805.76	225.00	293.03
LOCKS	332,268.75	562,354.76	+ 230,086.01	225.00	380.81
O'QUINN	88,305.00	515,217.00	+ 426,912.00	100.00	583.45
SCHWARTZ	29,145.00	505,026.34	+ 475,881.34	100.00	1,732.81
DEAN	1,340,437.50	331,346.75	- 1,009,090.75	225.00	55.62
MUSSELEWHITE	304,657.50	152,535.04	- 152,122.46	100.00	75.10
SCHLEGEL	763,678.12	231,785.14	- 531,892.99	262.50	79.67

II. PROCEDURAL POSTURE

By notice of motion dated May 20, 1985, Mr. Dean has asked the court to set aside the PMC's fee-sharing agreement. The jurisdictional predicate for the motion is not stated. A new motion to alter or amend the January 7, 1985 judgment insofar as it concerns the agreement would no longer be timely under Rule 59(e) of the Federal Rules of Civil Procedure. A number of Rule 59(e) motions requesting reconsideration of the January 7, 1985 fee order, including one by Mr. Dean to increase his fee award, were pending when his motion was filed. His present application will be deemed a timely amendment to his original Rule 59(e) motion. Alternatively, Mr. Dean's motion will be treated as an independent action for declaratory judgment. *See* 28 U.S.C. § 2201; Fed.R.Civ.P. 57. Federal question jurisdiction would exist. *See infra* Part III. Diversity of citizenship, though unneeded, is present as well.

The other PMC members have opposed Mr. Dean's motion and seek arbitration of the issues raised. They have submitted an independent petition to compel arbitration or, in the alternative, a motion for a stay of proceedings pending arbitration, pursuant to the Federal Arbitration

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Act. See 9 U.S.C. §§ 3, 4. Both applications will be decided in this memorandum and order, which will supersede the unpublished January 7, 1985 memorandum of this court insofar as the latter referred to the PMC's fee-sharing agreement.

III. LAW ON REVIEW OF FEE-SHARING AGREEMENTS

Under Rule 23(e) of the Federal Rules of Civil Procedure, the court has an obligation to protect the rights of class members. That duty requires review of the reasonableness of an internal fee-sharing agreement to ensure that it does not pose a danger of harm to the class. The court also has supervisory authority over attorneys who practice before it and thus an obligation to prevent breaches of professional ethics. See, e.g., *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160, 166 (3d Cir. 1984) (federal court has inherent power to discipline attorneys practicing before it); *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1114 (3d Cir. 1979) (court has authority to review and set aside contingent fee contracts under Rule 23(e) and its supervisory power); *Prandini v. National Tea Co.*, 557 F.2d 1015, 1019 (3d Cir. 1977) (applying bar association disciplinary rules to fee allocation agreement); *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977) (nothing court's obligation to class members when determining the amount of fee award); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1607 (1976).

Rule 23(e) and the common fund doctrine require a court to fix reasonable attorney fees when a settlement fund has been created in a class action. Under the "lode-star" formula prevailing in this and other circuits, the "touchstone for the fee [is] to be the actual effort made

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by the attorney to benefit the class." *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093, 1099 (2d Cir. 1977). See, e.g., *In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985) (containing an extensive discussion). When an attorney has performed services for the class but is allocated a portion of the fee award by an agreement among attorneys in an amount far different from the value of the services rendered to the class, the court must review the allocation to protect the rights of the class. Whether the total fee award amount is affected by the allocation is not decisive. See, e.g., *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 16-24 (S.D.N.Y. 1980); cf. *Housler v. First National Bank*, 524 F.Supp. 1063, 1065-66 (E.D.N.Y. 1981) (ignoring fee sharing arrangement not brought to court's attention at outset of agreement).

In a number of instances, courts have permitted class counsel to decide how a court-awarded fee should be allocated among them. See *In re Magic Marker Securities Litigation*, [1979-1980] Fed.Sec.L.Rep. (CCH) ¶ 97,116 at 96,195 (E.D.Pa. 1979) (approving joint fee application); *Valente v. Pepsico, Inc.*, [1979] Fed.Sec.L.Rep. (CCH) ¶ 96,921 at 95,863 (D.Del. 1979); *Del Noce v. Delyar Corp.*, 457 F.Supp. 1051, 1055 (S.D.N.Y. 1978) ("private arrangement as if they were law partners, or joint venturers"); *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C. 1978) ("Court will defer to the attorney's request that the fee award be made to the Committee of Counsel as a whole, and will not inquire further into the agreement among the attorneys"). None of these cases, however, holds that a court has no power to review an internal fee allocation agreement or that it has no duty to do so when circumstances call for such an inquiry. An attitude of "judicial indifference to attorney fee sharing arrangements,"

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whatever its propriety under ordinary circumstances, is "inappropriate here where another interest of general concern is implicated." *Kamens v. Horizon Corp.* [1981] Fed.Sec.L.Rep. (CCH) ¶ 98,007 at 91,218 n. 4 (S.D.N.Y. 1981).

Federal law governs the exercise of Rule 23(e) responsibilities and the court's inherent supervisory authority. See *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1110 n. 8 (3d Cir. 1979). Principles of professional ethics provide useful guidance to the courts in administering Rule 23(e) and in exercising their supervisory power since federal law has not developed comprehensive standards to govern the conduct of attorneys. In light of the value of uniformity in regulating the bar, federal courts look to the ABA Code of Professional Responsibility and the recently promulgated ABA Model Rules of Professional Conduct. See *in re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 160-61 (3d Cir. 1984); Code DR 2-107, 5-103; Model Rule 1.5, 1.8.

The Code has been enacted in nearly every state. The Model Rules, approved by the ABA in 1983, have been adopted by Arizona, New Jersey, and the United States Claims Court and Tax Court. They are under consideration in a number of other states including New York. See ABA/BNA Lawyers' Manual on Professional Conduct 613-14, 792 (current supp.).

Under Rule 23(e) these ethical principles are not dispositive. The focus of Rule 23(e) is prevention of harm to the rights of the class, a consideration that is independent of, albeit usually consistent with, the Code and Model Rule standards. In addition, general professional ethics guidelines may require interpretation in the class action setting because of the special problems posed by this kind of litigation. As Judge Adams recently observed:

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Perhaps no area of the law provokes as much litigation concerning ethical issues as class actions. . . . Moreover, the Code of Professional Responsibility, Model Rules of Professional Conduct, as well as bar association opinions provide title guidance to the class action practitioner. . . . Courts confronting an ethical problem in the class action setting must focus on two points. First, courts cannot mechanically transpose to class actions the rules developed in the traditional lawyer-client setting context; and second, a resolution of such issues would appear to call for a balancing process that in most cases should be undertaken initially by the district court.

In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (citations omitted). Thus a careful analysis must be undertaken with particular attention to the problems and policies of class litigation.

IV. PETITION TO COMPEL ARBITRATION

The petition for an order compelling arbitration is largely mooted, given the decision on the merits of Mr. Dean's application. Nevertheless, the question of whether this dispute must be referred to arbitration is an antecedent issue that must be addressed before the merits are reached.

The parties disagree about whether the scope of the fee-sharing agreement's arbitration clause is broad enough to cover the issues raised. The provision by its terms requires arbitration of disputes "concerning monies due a member or his rights under this agreement." The scope of this "clause, like any contract provision, is a question of intent

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of the parties.” *S.A. Mineracao da Trindade-Samitri v. Utah International, Inc.*, 745 F.2d 190, 193 (2d Cir. 1984). “The federal policy favoring arbitration requires [a court] to construe arbitration clauses as broadly as possible.” *Id.* at 194. Doubts about arbitrability “should be ‘resolved in favor of coverage.’” *Wire Service Guild v. United Press International*, 623 F.2d 257, 260 (2d Cir. 1980) (quoting *International Association of Machinists and Aerospace Workers, AFL-CIO v. General Electric Co.*, 406 F.2d 1046, 1048 (2d Cir. 1969)).

Intent of the parties here is unclear. The questions before the court concern amounts payable to PMC members or their contractual rights only in the strained sense that resolution of these issues will determine whether the PMC can allocate fees in accordance with the agreement. Arguably the arbitration provision does not cover such issues. A decision on the scope of the arbitration clause is not required because the issues presented by Mr. Dean’s motion are not arbitrable, whether or not the clause purports to cover them. —

The general federal policy favoring arbitration must be balanced against the equally significant policies favoring judicial determination of questions about the propriety of professional conduct under Rule 23(e) and the court’s supervisory obligations. “In such a situation, generalities must give way to careful analysis of the different, sometimes competing, public policy interests.” *Allegaert v. Perot*, 548 F.2d 432, 438 (2d Cir.) (certain bankruptcy issues not arbitrable), *cert. denied*, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1084 (1977). *See also, e.g., Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953) (claims under Securities Act of 1933 not arbitrable) (cited with approval in *Dean Witter Reynolds, Inc. v. Byrd*, — U.S. —, 105 S.Ct. 1238, 1240 n. 1, 84 L.Ed.2d 158 (1985)); —

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Smokey Greenhaw Cotton Co., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc. 720 F.2d 1446, 1448 (5th Cir. 1983) (claims under Securities Exchange Act of 1934 not arbitrable); *N.V. Maatschappij Voor Industriële Waarden v. A.O. Smith Corp.*, 532 F.2d 874, 876 (2d Cir. 1976) (antitrust and patent invalidity issues not arbitrable); *American Safety Equipment Corp. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821, 825-28 (2d Cir. 1968) (antitrust issues not arbitrable); *S.A. Mineracao da Trindade-Samitri v. Utah International Inc.*, 576 F.Supp. 566, 574-75 (S.D.N.Y.) (RICO claims not arbitrable), *order certified for interlocutory appeal*, 579 F.Supp. 1049 (S.D.N.Y.), *appealed on other grounds and affirmed*, 745 F.2d 190, 196-97 (2d Cir. 1984).

The legality of the fee allocation agreement under Rule 23(e) and the supervisory power of the court in ethical matters involving the bar is not an issue that the court can abandon to arbitrators. The "public interest in the dispute" is too great. *Allegaert*, 548 F.2d at 436. To allow an arbitrator to decide the questions here involved—questions that can be raised by the court *sua sponte* or by any class member—would be an abdication of responsibilities to the class and public that the law requires the court to discharge. Lawyers cannot limit the court's legal powers and duties by agreement among themselves. The issues of the legality and propriety of the fee-sharing arrangement "raised here are inappropriate for arbitration." *American Safety Equipment Corp.*, 391 F.2d at 828.

V. VALIDITY OF THE PMC FEE-SHARING AGREEMENT

Under the terms of the renegotiated agreement now before the court, each PMC member who advanced money for general expenses of the group as distinguished from individual

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expenses would receive three times the amount advanced, the multiplied amount being paid out of the individual fee and expense allowances of the individual members and the expense allowance of the PMC. The question to be decided is whether this fee allocation must be stricken either as a violation of professional ethics or as a threat to the rights of the class.

The PMC fee-sharing agreement raises two potential problems of professional ethics: inappropriate division of fees between lawyers who are not members of the same firm, and acquisition of a financial interest in the litigation. Ethical prohibitions in either respect are inapplicable here. In addition, no danger to the rights of the class is present under the circumstances of this case. Other considerations render undesirable a mechanical rule against fee-sharing agreements of this kind in all cases.

A. Division of Fees

The ABA Code of Professional Responsibility prohibits a lawyer from dividing a legal fee with another lawyer who is not in the same law firm, unless (1) the client consents to the arrangement, (2) the "division is made in proportion to the services performed and responsibility assumed by each," and (3) the total fee is reasonable. Code DR 2-107(A). The Model Rules of Professional Conduct adopted by the ABA in 1983 contain a more liberal provision. It allows lawyers not in the same firm to divide a fee if (1) either "the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation," (2) the client does not object to any lawyer's participation, and (3) the total fee is reasonable. Model Rule 1.5(e).

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Neither provision necessarily restricts the freedom of the PMC to allocate fees among committee members. The PMC may be considered an *ad hoc* law firm, a joint venture formed for the purpose of prosecuting the Agent Orange multidistrict litigation.

Business realities of law practice often require that those who bring clients and capital to a law firm be better compensated than those whose talents lie in the area of preparing legal papers and arguments. *See generally* M. Altman & R. Weil, *How to Manage Your Law Office* ch. 5 (1984); *Law Office Economics and Management Manual* §§ 2, 15, 27 (1984). Rainmakers are usually better rewarded than those who labor in the back room. Given the state of the case when Yannacone and Associates found itself without funds to continue, it was clear when the PMC was organized that money was a more sought after commodity than talent.

Viewed from this perspective, the Code and Model Rule restrictions on splitting fees among lawyers of different firms do not control this joint venture. *Cf.* D.C.Bar Comm. on Legal Ethics Op. 151 (April 16, 1985) (DR 2-107(A) permits lawyer who is of counsel to a firm to split fee between lawyer and firm if the of-counsel relationship is akin to that of lawyers in a law firm), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 766 (current supp.); N.Y. City Bar Ass'n Comm. on Professional and Judicial Ethics Op. 82-66 (March 29, 1985) (DR 2-107 (A) permits attorney admitted in another state who is in firm to share fees with the firm, whether or not attorney works in New York or out-of-state office), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 745-46 (current supp.); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (general principles of professional ethics cannot be applied blindly in class action setting).

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The Model Rule provision clearly reflects an increased recognition of the business realities of the legal profession. As the commentary notes, "[a] division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. . . ." Model Rule 1.5(e) comment.

The PMC agreement meets the Rule's requirements. First, each PMC member assumed joint responsibility for prosecution of the class action, and that assumption of responsibility was approved by the court on behalf of the class. Cf. ABA Comm. on Ethics and Professional Responsibility Informal Op. 85-1514 (April 27, 1985) (Model Rule 1.5(e) requires assumption of responsibility comparable to that of a partner in a law firm under similar circumstances, including financial and ethical responsibility and responsibility for adequacy of representation and client communication), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 766-67 (current supp). Second, the total fee allowed by the court is reasonable by definition.

No ethical violation can be found here on the basis of inappropriate division of fees among lawyers not in the same firm. Nevertheless, the provisions of Model Rule 1.5(e) and Code DR 2-107(A) on disapproval by the client of any fee splitting arrangement suggest that the class—and the court as the protector of the class—has a continuing interest in being informed of any special fee arrangement as soon as possible.

B. Acquisition of Interest in Litigation

The ABA Code of Professional Responsibility prohibits a lawyer from acquiring a proprietary interest in a case except by a lien for fees or a contingent fee agreement.

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Code DR 5-103(A). An attorney may advance or guarantee the expenses of a litigation only if the client remains ultimately liable for payment. *Id.* 5-103(B). This latter provision has been held applicable to class actions, notwithstanding that it presents a formidable obstacle to the practical ability of counsel to prosecute class litigation. *See, e.g., In re Mid-Atlantic Toyota Antitrust Litigation*, 93 F.R.D. 485 (D.Md. 1982) (denying class certification because arrangement between named plaintiffs and counsel violated DR 5-103(B)); Birmingham Bar Ass'n Op. 22 (May 13, 1983) (DR 5-103(B) prohibits contingent expense agreement in class actions), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 801:1104 (1984); Va. Bar Ass'n Informal Op. 485 (Sept. 8, 1983) (same), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 801:8813 (1984). *But cf. In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring) (general principles of professional ethics cannot be applied blindly in class action setting); Code Canon 2 ("A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available").

The Model Rules of Professional Conduct carry forward the prohibition on acquisition of a financial interest in a case. *See* Model Rule 1.8. The Rule, however, does allow a lawyer to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." *Id.* 1.8(e)(1).

The PMC agreement goes beyond the simple contingent reimbursement of expenses. It contemplates the return of a profit on the funds advanced. But the profit on the investment is to be paid out of the pooled fee award, not the settlement fund. No independent interest is acquired

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in the litigation by the investors. Nevertheless, to the extent that the PMC agreement creates a possible conflict of interest, it might be characterized as involving an acquisition of proprietary interest that falls within the prohibitions of the Code and Model Rules. *Cf.* Code Canon 9 ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety") (omitted from Model Rules).

The circumstances of this complex and unique class action require a more sophisticated analysis than would be appropriate in the kind of simple two-party case that furnishes the model for much of the relevant ethical guides. *See In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 163 (3d Cir. 1984) (Adams, J., concurring). The prohibition on acquisition of a proprietary interest in a litigation has its basis in common law concepts of champerty and maintenance. It is a prophylactic rule intended to prevent conflicts of interest between lawyer and client that could interfere with the lawyer's exercise of free judgment on behalf of the client. Code EC 5-3; Model Rule 1.8 comment. Similarly, the fundamental concern in the instant case is protection of the rights of the class, in part through minimization of potentially detrimental conflicts of interest. But it is also important to avoid creation of disincentives that in individual instances may unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class. An ironclad requirement that class representatives remain ultimately liable for expenses incurred, for example, would prevent many meritorious cases from reaching the courts.

As more fully discussed below, a simple prohibition on advances of cash for expenses does not adequately balance these competing considerations. Moreover, because of the

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court's responsibility for approval of a class action settlement, it is not the only feasible alternative. A case-by-case examination is not only practical, but advances the important policies favoring class litigation in many instances.

C. Protection of the Rights of the Class

Under Rule 23(e) and the common fund doctrine, when a monetary settlement is reached in a class action federal courts are responsible for assessing attorney fees that are reasonable. Fee awards must reflect the actual work that benefited the class. The court's responsibility for controlling attorney fees arises from the need to safeguard the interests of the class. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1304-1305 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985).

When lawyers in a class action agree on an allocation of their fees *inter se* that diverges from the allocation determined by the court, the court must review the reasons for and effect of that allocation to ensure that it has not had and will not have an impact adverse to the interests of the class. *See, e.g., Lewis v. Teleprompter Corp.*, 88 F.R.D. 11 (S.D.N.Y. 1980). What are the dangers of a fee-splitting agreement such as that of the PMC?

Most important, an agreement of this kind may create an incentive toward early settlement that may not be in the interests of the class. An attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now. An early settlement will maximize the investor's profit, because he or she then can reinvest the funds elsewhere immediately. A lawyer in this situation might not negotiate as hard or might decide to settle early, when holding out for a higher settlement or going to trial would be in the

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best interests of the class. *See generally* Coffee, The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation, *Law & Contemp. Probs.*, Summer 1985, at 5.

The court's responsibility under Rule 23(e) for approval of a class action settlement limits to some extent the effect of this potential incentive for premature settlement. Before approving a class action settlement, a court must find it fair, reasonable and adequate, based on a detailed analysis of the law and facts. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 758-63 (E.D.N.Y. 1984). The court, however, cannot make a precise determination of the fairness of the settlement; its task is to decide whether the agreed upon settlement falls within "the range of reasonableness." *Id.*, 597 F.Supp. at 762. Thus the court's approval process may not completely eliminate the more subtle effects of undue pressure on attorneys toward settlement.

In some cases any incentive to settle early will be counteracted by the incentive to prolong litigation created by the "lodestar" method of fee calculation. The lodestar formula rewards counsel based on the number of hours reasonably spent on a case and permits a court to award risk-of-litigation and quality-of-representation multipliers for time spent (but not expense incurred). It thus encourages attorneys to seek higher fees by delaying settlement and spending more time on a case. *See In re "Agent Orange" Product Liability Litigation*, 611 F.Supp. 1296, 1305-1306 (E.D.N.Y. Jan. 7, 1985, as modified June 18, 1985).

In the instant case, the theoretical incentive to settle early appears not to have been an appreciable factor in inducing settlement. It is clear that the class action settlement was

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neither premature nor ill-considered, being in the best interests of the class. Compare *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp 740 (E.D.N.Y. 1984) (fairness of proposed settlement) with *id.*, 611 F.Supp. 1223 (E.D.N.Y. 1985) (granting summary judgment in the cases of veterans who opted out of the class action). Based on the court's direct observation of counsel, the litigation and settlement negotiations, there is no reason to believe that the existence of the PMC's fee-sharing agreement had any appreciable untoward effect on the decision to settle. Moreover, any incentive to settle would have been counteracted by the lodestar-created incentive to prolong litigation. Here, all nine PMC members worked on the case; only three invested funds without expending extensive productive hours on behalf of the class.

A number of other considerations, though not dispositive, favor giving effect to the PMC's fee-splitting agreement. First, it results in no greater expense than the class otherwise would have borne. The profit will be paid by those members of the PMC who did the work.

Second, law is a business and within limits of public policy such as those set by professional ethics and the usury laws, lawyers may make their own business arrangements as do other business people. No usury is involved *inter se* in this joint venture; the funds advanced were investments, not loans that had to be repaid. A court is not in a good position to review this kind of consensual fee allocation. It lacks detailed knowledge about how lawyers usually structure business relationship among themselves.

Third, there is great doubt that the money to fund the litigation could have been obtained on more favorable terms. A similar arrangement with nonlawyer investors probably would have violated professional ethics. See

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Code DR 3-102(A) (lawyer shall not share fees with non-lawyer); Model Rule 5.4(a) (same); San Francisco Bar Ass'n Legal Ethics Comm. Op. 1981-1 (Nov. 29, 1981) (prohibiting contingent reimbursement arrangement with nonlawyer lender), *summarized in* ABA/BNA Lawyers' Manual on Professional Conduct 801:1851 (1984). Here financing was by lawyers expected to lend their professional skills as well as advance their money. In the absence of adequate financing, the case might well have collapsed, and neither the class nor the attorneys who worked on their behalf would have received anything.

Fourth, a significant profit could have been earned by investing the funds conventionally. This factor must be considered in evaluating the reasonableness of the three-fold return promised here. In December 1983 the PMC attorneys entered into their original fee-sharing agreement, retroactive to October 1983. It called for a substantial advance from each PMC member except Messrs. Dean, Schlegel and Musslewhite. Interest rates for conventional investments were then high. The length of time that the Agent Orange case would take to litigate and its outcome both were uncertain. The investing attorneys could have reasonably expected to receive a significant return on their capital through reasonably safe alternative investments—perhaps 50 to 100 percent—over the same time period that their money was to be invested in the Agent Orange litigation. Thus at the time that the attorneys committed themselves to making these advances, the expected extra "profit" was significantly less than the agreed upon total interest of 200 percent, being perhaps 100 to 150 percent above the interest they otherwise probably could have earned in less risky enterprises.

Finally, it should be noted that, had the PMC received the roughly \$30 million in fees and expenses that it sought

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in its original fee application, the extra profit to the money suppliers would not have given them an appreciable relative advantage over those who did most of the legal work.

The parties agree that the original agreement was made freely, without duress or coercion. No PMC member protested when the agreement was renegotiated. All else being equal, these factors suggest giving "deference to the parties' contractual agreements" if possible. *Dunn v. H.K. Porter Co., Inc.*, 602 F.2d 1105, 1111 (3d Cir.1979). See also *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 395, 400 (D.D.C.1978).

The practical need for financing in complex litigation renders undesirable an ironclad rule prohibiting such agreements in all cases on the basis of a potential for harmful conflict of interest. If arrangements of this kind were banned outright attorneys might be dissuaded from financing risky but meritorious class litigation in the future. A case-by-case examination of such fee-sharing agreements best balances this potential chilling effect against the need to safeguard the interests of the class and professional values.

Different arrangements may call for different treatment. The agreement now before the court, for example, differs from that originally entered into by the PMC attorneys. The original agreement provided for a *pro rata* sharing of 50 percent of the amount of pooled fees remaining after the investing lawyers were paid their threefold return. Such an arrangement not only further distorts the court allocation of fees; it also tends to reward a lawyer who puts in neither funding nor substantial productive efforts. Whether a flat rule against provisions of this kind would be appropriate need not be decided here.

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VI. EARLY FEE DISCLOSURE RULE IN FUTURE CASES

The most troubling aspect of the agreement before the court is the failure of the PMC to reveal its existence until very late in the litigation. Because class attorneys have special fiduciary obligations to the class, and because the court has a responsibility to protect the rights of the class, the class and the court have a right to know about any agreements among counsel for allocating fees payable from a class recovery. In view of the lack of a personal relationship between most class members and the attorneys representing them it is essential that this information be available through the court. Class actions are public or quasi-public in nature. Rule 23 of the Federal Rules of Civil Procedure serves in many respects as a "sunshine" law in its requirements of notice to the class and public hearings. The public and press must have full access to information about this kind of fee-sharing arrangement so that an opportunity is afforded for comment and objection.

In future cases, *as soon as a fee-sharing arrangement is made its existence must be made known to the court*, and through the court to the class. Subsequent modifications if any also must be reported promptly to the court.

Whether the expense of a separate notification to members of the class is warranted will be a matter for the court to consider in connection with each case's needs. Here the size of the class would have made a separate notification inappropriate. The press, however, could have been counted on to spread the word so that interested leaders of the bar and veterans community might have been informed. When notice was ultimately given to the class the fee arrangement notification could have been incorporated in the communication to the class. *See S.D.N.Y. & E.D. N.Y.Civ.R. 5(a).*

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A rule requiring early disclosure will have a number of advantages. First, the court at the outset can determine whether to permit the fee allocation agreement to stand before any attorney invests substantial time and funds. Post hoc second-guessing, detriment to individual lawyers and acrimony among counsel will be avoided. *Cf. DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985) (decision about merits of case for calculation of fee award must be *ex ante* determination, not based on hindsight afforded by ultimate result).

Second, information on internal financial arrangements will help the court make an informed decision about which lawyers should be permitted to manage the litigation and about whether and under what conditions a class should be certified. Courts have the power to appoint and replace class counsel. *See, e.g., Fed.R.Civ.P. 23(d)(3); Cullen v. New York State Civil Service Commission*, 435 F.Supp. 546, 563-64 (E.D.N.Y.), *appeal dismissed*, 566 F.2d 846, 848-49 (2d Cir. 1977); *Percodani v. Riker-Maxson Corp.*, 51 F.R.D. 263 (S.D.N.Y. 1970), *aff'd sub nom. Farber v. Riker-Maxson Corp.*, 442 F.2d 457 (2d Cir. 1971). *Cf., e.g., Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 744 (9th Cir. 1977) (upholding court's power to appoint lead counsel in nonclass action setting); *In re Air Crash Disaster at Florida Everglades on December 29, 1972*, 549 F.2d 1006, 1012 & n. 8, 1014-15 (5th Cir. 1977) (same); *MacAlister v. Guterma*, 263 F.2d 65, 68-69 (2d Cir. 1958) (same). A court might well base a decision about which attorneys will best represent the class in part on the lawyers' fee allocation arrangements.

When a case can proceed as a class action only if financial agreements of the kind adopted by the PMC are made, the court may deem this a factor to be weighed against class

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certification. Cf. Fed.R.Civ.P. 23(a)(4). Alternatively, class members might choose to decline representation by class counsel under such conditions by opting out of the class action and proceeding individually or as a separate subclass. See Fed.R.Civ.P. 23(d).

The court when informed of the fee allocation arrangement could require that it be restructured to minimize inappropriate incentives. See *id.* For example, an agreement for a multiplied repayment of funds advanced might be modified to provide instead for an annual rate of return, with a maximum total return. Such an arrangement would tend to decrease the investing attorney's improper incentive to settle early. At the same time it would provide a cap on the total repayment to minimize the noninvesting attorney's incentive to settle to avoid an obligation to pay cumulative annual interest that might become onerous in a lengthy litigation.

A reporting requirement could be separately imposed by court order at the beginning of each litigation. See, e.g., *In re Equity Funding Corp. of America Securities Litigation*, 438 F.Supp. 1303, 1323 (C.D.Cal.1977); Manual for Complex Litigation § 1.47, Sample Order (alternative 2) ¶¶ 4, 5 (5th ed. 1982). A fixed rule requiring disclosure in every class action, however, is more desirable than issuance of an order in each case. See *Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 17 (S.D.N.Y.1980) (objecting to fee agreements "concealed from the court and not disclosed until consideration of the application for fee awards was well under way").

For the reasons explicated above, power to interpret Rule 23 entails by implication the responsibility of a trial court to establish a decisional rule demanding early revelation of fee sharing arrangements to aid in carrying out responsi-

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bilities under Rule 23. The Advisory Committee on Civil Rules of the Judicial Conference of the United States may wish to consider amending Rule 23 to incorporate an explicit disclosure requirement in order to forewarn class attorneys.

The local Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York already require disclosure of attorney fee allocation agreements in class actions when notice of fee applications is given to the class:

Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and *shall disclose any fee sharing agreements with anyone*. The court, in its discretion, may direct that the notice also be given the New York Regional Office of the Securities and Exchange Commission. Where the court directs notice of a hearing upon a proposed voluntary dismissal or settlement of a derivative or class action, the above information as to the applications shall be included in the notice.

S.D.N.Y. & E.D.N.Y.Civ.R. 5(a) (emphasis added). This Rule 5(a) notice is given late in the litigation, after settlement or other disposition.

The fee application notice requirements of Local Rule 5(a) were waived in this class action "because of the need for continued intensive work by the attorneys until the close of the fairness hearings and because of the complexity of

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the fee applications." Notice of Proposed Settlement of Class Action, p. 7, reprinted in *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740, 869 (E.D. N.Y. 1984). At the time the court allowed this waiver it was unaware of the existence of the PMC's fee-sharing arrangement.

Disclosure of a fee-sharing agreement at the beginning of every class action is preferable to disclosure after settlement on application for attorney fees. Based on the Agent Orange PMC agreement problems, the Board of Judges of the United States District Court for the Eastern District of New York has unanimously agreed at one of its regular monthly meetings that Local Rule 5 should be modified to require early notice. This amendment will minimize fee-sharing problems in future litigations.

Appropriate steps in amending Local Rule 5 will be taken, preferably in concert with the United States District Court for the Southern District of New York, so that the uniformity of the joint Southern-Eastern District local rules is preserved. Regardless of any amendment to Local Rule 5, in the future full disclosure of fee-sharing arrangements will be required at the outset in any class action filed in this district. Any modification in such arrangements must be promptly brought to the court's attention.

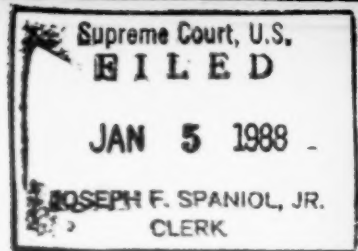
VII. CONCLUSION

The petition to compel arbitration is dismissed. The motion to set aside the PMC's fee-sharing agreement as renegotiated is denied. The Clerk of the Court is directed to forward copies of this memorandum and order to the parties. No costs or disbursements are granted.

SO ORDERED.

EDITOR'S NOTE

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NO. 87-620

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IN THE SUPREME COURT
OF THE UNITED STATES

(October Term 1987)

*

BARRY KRUPKIN, ET AL.,
Petitioners,

versus

DOW CHEMICAL CO, ET AL.,
Respondents.

IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

*

REPLY BRIEF OF PETITIONERS TO BOTH BRIEFS
IN OPPOSITION FILED BY RESPONDENT CHEMICAL
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IN OPPOSITION FILED BY RESPONDENT CHEMICAL
COMPANIES AND THE PLAINTIFFS' MANAGEMENT
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I.

PRELIMINARY STATMENT

For simplicity we will refer to the
Opposition Brief of the Respondent
Chemical Companies as the "Monsanto Brief"
(the first company named) and the
Opposition Brief of the Plaintiffs
Management Committee as the "PMC Brief".

Some preliminary observations are in

order. As Respondents have repeatedly done on prior occasions, see, e.g., *In re Agent Orange Product Liability Litigation*, 800 F.2d 14 (2 Cir. 1986), they once again seek to impugn the motives of the undersigned counsel by stating that he chose to oppose the settlement only because of Judge Weinstein's low fee award to him, see Monsanto Brief, pp. 23, 24 and PMC Brief, pp. 14, 15. They do this despite the fact that they know - as the only sworn proof in the record establishes, see Doc. 5600, and as the Court of Appeals has previously found in a final judgment, 800 F.2d at 16, 17 - that undersigned counsel launched his crusade against the settlement not because of any peevishness about the fees but because he became "disenchanted with the purported settlement".¹

1. 800 F.2d at 16, 17. Indeed, undersigned counsel announced his opposition to the settlement in December of 1984, *before* Judge Weinstein made his fee awards in January 1985, Doc. 5600, and the more likely scenario is that Judge Weinstein made the fee awards and remarks

We mention this because we perceive that such remarks are being repeatedly utilized in an effort to discredit the undersigned counsel's question-and-answer affidavit, which was totally uncontroverted in the district court and which indisputably established the improvidence of the purported settlement. See Petition at 13-27.²

about all counsel in a manner so as to punish the only two attorneys who had been on the PMC and had dared oppose the settlement (undersigned counsel and Ashcraft and Gerel), precisely because they opposed the settlement. See 611 F.Supp. at 1332, 1367.

2. There is no maudlin desire on the part of undersigned counsel to assume the posture of a lonely crusader in this case. To be sure, undersigned counsel, as the Court of Appeals observed, urged "the other members of the PMC to reject the settlement, and to challenge the settlement on appeal", 800 F.2d at 17, and there was certainly no desire to go it alone. But, the decision for the undersigned counsel was clear and compelling. Simply stated, the Agent Orange "settlement" constitutes an unmitigated disaster - a judicial disgrace that we have no choice but to urge this Honorable Court to rectify.

II.

There Are Several Valid Grounds For The Exercise of Certiorari Jurisdiction

The main thrusts of the Opposition Briefs as to why the Court should not invoke certiorari jurisdiction are: because this case is "sui generis" and, therefore, a decision by this Court "would have acutely limited precedential value"; a review by this Court consists primarily of a factual review; the Petitioners failed "to identify a single pertinent conflict in the circuits or with any decision of this Court"; and this litigation involves no important questions of federal law or policy. Monsanto Brief at 12-14 and PMC Brief at 8-14. The Respondents are wrong on all counts.

A. This Litigation Clearly Involves Issues Which Will Have Precedential Value and "Pertinent Conflicts" Among The Circuit Courts or With This Court.

The following examples fully demonstrate the superficiality of Respondents' arguments:

(1) Certification of the Class. The question of whether a Rule 23(b)(3) class should ever be certified in mass accident or chemical exposure cases involving a large number of victims with serious injuries or deaths obviously has significant precedential value because such types of incidences are on the increase. There is no secret that an extremely important debate is presently raging among members of the American Trial Lawyers Association about the use of class actions in mass tort, including toxic tort, litigation. There are those who subscribe to the thinking expressed in *In re Northern Dist. of Cal. Dalkon Shield IUD Product Liability Litigation*, 693 F.2d 847 (9 Cir. 1982), cert den. 459 U.S. 1171, see discussion at 35-39 of Petition, while there are others who believe that class actions are the ultimate solution to almost all mass tort situations. This

latter group has continued its class action crusade, for example those involving the Bhopal disaster and Bendectine exposure. See *In re Bendectine Products Litigation*, 749 F.2d 300 (6 Cir. 1984) and *In Re Union Carbide Corp. Gas Plant Disaster*, 809 F.2d. 195 (2 Cir. 1987), cert den. In addition, the Court of Appeals virtually concedes that its decision to affirm certification of the Agent Orange class runs counter to the holding of the Ninth Circuit in *Dalkon Shield* and other cases. 818 F.2d at 164.

(2) The role of the district judge in class actions. The role of a district judge in Rule 23 class actions is an issue that, once clarified by this Court, will affect every federal class action case henceforward. Can a judge in any class action dictate the terms of a proposed settlement and aggressively orchestrate the negotiation process and then be counted upon to *objectively* decide whether

the settlement is fair, adequate and reasonable? See Petition at 39-42.³ In view of the virtually unlimited power a district judge is facially given in Rule 23 class actions, in the form of "discretion", this case is the appropriate one, we respectfully submit, for this Court to review and establish the limits of that power. If it be argued that Judge Weinstein's aggressive conduct is but an isolated aberration and therefore no precedential value will attach, the obvious reply, and a valid one, is that it can certainly happen again as long as judges are human beings and Rule 23 remains unchanged. Moreover, the Court of Appeals' ratification of Judge Weinstein's aggressive domination of the settlement negotiations is clearly in conflict with

3. There are other manifestations of this abuse of power, such as Judge Weinstein's arbitrary disfranchisement of large subgroups, such as the women and children. See Petition at 25, 26. See also *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11 Cir. 1983).

the principles discussed in *Plummer v. Chemical Bank*, 668 F.2d at 654, 655 666 (2 Cir. 1982); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5 Cir. 1978); and *In re General Motors*, 594 F.2d 1106, 1125 (7 Cir. 1979), cert den 444 U.S. 870.⁴

(3) The pre-notification process issue. The resolution of the question of whether a district court should - where the number, size and kinds of claims are unknown - generally always conduct a pre-notification hearing process, including a claims analysis and formulation of the distribution plan, so as make clear to each member of the class the "unit of recovery", will also have broad preceden-

4. This Court has demonstrated that it is willing to grant certiorari to review abuses of judicial power. See, e.g., *Valley Forge College v. Americans United*, 454 U.S. 464, 490 (1982) ("Because we are unwilling to countenance such a departure from the limits of judicial power contained in Article II, the judgment of the Court of Appeals is reversed.") and *Evans v. Jeff*, 106 S.Ct. 1531, 1537 (1986).

tial value. The courts in *all* class actions involving the assertion of damages must establish a "unit of recovery" for each category of claimants - that is the essence of settlement enlightenment. See for example, *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5 Cir. 1981) and see Petition at 44-48. In addition, the holding of the Court of Appeals in these matters is contrary to the direct rationale of the Seventh Circuit's decision in *In re General Motors*, 594 F.2d at 1124-1126, as well as the dicta rationale of the Fifth Circuit in *In re Corrugated Container*, 643 F.2d at 224.⁵

5. The Court, in *In re Corrugated Containers Antitrust Litigation*, a case cited and relied upon by the Respondents, recommended that all settlement notices contain information as to "units of recovery," 643 F.2d at 224, but upheld the notice in that case because the members with the larger claims "had the sophistication to estimate an approximate amount they would secure from the settlements". *Id.* In this case, precisely the opposite is true - few, if any, of the claimants, including those with the larger claims, are sophisticated in that context.

(4) Failure to give class members the right to opt-out of settlement. Another issue with overwhelming precedential impact is the question of whether constitutionally - even though Rule 23 does not expressly require it - a district court should, particularly in a case of this type, permit members of the class to opt-out of a proposed settlement *after* the "unit of recovery" has been established with respect to each claimant. A ruling upon this vital issue will affect *all* future class actions where damages are sought and the unit of recovery is *not* known at the inception of the litigation - which of course will include the vast majority of class action cases. See Petition at 48-51. Moreover, the holding of the Court of Appeals, while consistent with such cases as *Officers for Justice v. Civil Service Commission*, 688 F.2d 615 (9 Cir. 1982), is directly contrary to the express mandate that the notice of a class

settlement include the option "to state a desire for exclusion" as one of the three "important" alternatives each member of the class must be given in connection with a class settlement. See *Greenfield v. Villages Industries*, 483 F.2d 824, 832 (3 Cir. 1973); *Pettway*, 576 F.2d at 1182; *In re Corrugated Containers*, 643 F.2d at 223 ("whether one or two notices are employed", each member of the class should be allowed to "opt-out of the class settlement"); *In re Four Seasons Securities Laws Litigation*, 502 F.2d 834, 842, 843 (10 Cir 1974); and see Petition at 48-51.⁶

6. The action of the Court of Appeals in this case was particularly erroneous because the Monsanto Respondents had been given the opportunity, in the May 7, 1984 tentative settlement agreement, to unilaterally cancel the settlement if they concluded that so many members of the class had opted-out as to make the settlement unfeasible from their standpoint. Such provision certainly neutralizes the criticism expressed in *Officers for Justice*, 688 F.2d at 635, that to include the right to opt-out in the settlement notice would discourage class action defendants from settling because "defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with questionable claims."

(5) The prima facie rule in "nuisance value" settlements. Another crucial issue at stake, with heavy precedential value, is whether the Court will adopt the "prima facie rule", which was enunciated in *City of Detroit v. Grinnell*, 495 F.2d 448 (2nd Cir. 1976) ("*Grinnell I*"), see Petition at 54, 55, so that in all class actions, where the settlement offer amounts "to only a fraction of the ultimate possible recovery" and the plaintiffs have what appears to be a "prima facie case" on liability, 495 F.2d at 455, it will generally be an abuse of discretion to approve such a settlement.

(6) Prima facie case as to medical causation; *In Re Agent Orange vs. Ferebee*. In determining whether there was a prima facie case on liability, the two crucial questions, according to the Court of Appeals, 813 F.2d at 164, 165, 187, were medical causation and the military contract defense. As to medical causation,

a decision which will affect *all* chemical exposure and toxic tort personal injury litigation (individual as well as class action) - litigation which is certainly in the public interest and is becoming much more frequent - will be whether plaintiffs can survive summary judgment where the defendants, who always have much greater financial resources than plaintiffs, have procured negative epidemiological studies and the plaintiffs have been financially unable to respond in kind. Put another way, can epidemiological studies sponsored by the defendants conclusively negate medical causation *regardless* of what the other clinical, medical, toxicological and expert opinion evidence might be? In that regard, we respectfully submit that the Court should resolve the irreconcilable divergence between the Court of Appeals in this case and *Ferebee v. Chevron Chem Co.*, 736 F.2d 1529 (D.C.Cir.), cert den 105 S.Ct. 545 (1984). As we state in the

Petition, this Court's decision on that crucial issue could very well decide whether future toxic tort litigation is realistically viable. See Petition at 61, 62.

(7) The military contract defense; bringing order out of chaos. This Court has apparently recognized the precedential importance of questions involving the military contract defense by granting certiorari in *Boyle v. United Technologies Corp.*, 107 S.Ct. 872. The primary issue at stake here is whether the *novel* formulation adopted by the Court of Appeals should be the law of the land.⁷ Such novel formulation is in direct conflict with some of the other Courts of Appeals and is in greater to lesser shades of

7. This Court has frequently granted certiorari to pass upon "novel" issues. See, e.g., *Valley Forge College v. American United*, 454 U.S. at 470 ("Because of the unusually broad and novel view ... adopted by the Court of Appeals, we granted certiorari.").

conflict with others.⁸ See Petition at 55-60 and the cases there cited and discussed. This Court should, we say respectfully, bring order out of chaos in this area of the law and such marshalling of judicial precepts should include this case.

(8) Alteration of the settlement by Judge Weinstein. Lastly, a question which potentially pervades all class action settlements is whether a district judge can unilaterally alter the material terms of a settlement negotiated by the parties. Though the Monsanto Respondent incomprehensibly argues that Petitioners' "claim that the district court unilaterally altered the settlement agreement is incomprehensible," Monsanto Brief at 22, Judge Weinstein's arrogation to himself of the

8. In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979), this Court granted certiorari even though the conflicts among the "various courts" were not necessarily specific and diametrical but consisted of "[d]iffering views" on the issue in question.

power to unilaterally devise a distribution plan contrary to the plan devised by class counsel, *is undisputed*. The PMC assumed that the settlement agreement it negotiated was based on tort concepts of cause and effect. This is demonstrated by its proposed distribution plan, which was rejected by Judge Weinstein. See discussion of the PMC plan in 611 F.Supp. 1396 at 1407-1410 and 813 F.2d at 182, 184. Moreover, the affirmation by the Court of Appeals of Judge Weinstein's right to formulate a distribution plan contrary to the wishes of the PMC seems to run counter to this Court's reasoning in *Evans v Jeff*, 106 S.Ct. 1531, 1537 (1986) ("Rule 23(e) does not give the court the power, in advance of trial, to modify a proposed consent decree and order its acceptance over either party's objection.").⁹ For other authorities, see Petition at 39, 40.

9. The Respondents argue that many questions pertaining to the settlement are but factual determinations confirmed by

9. In The Final Analysis This Court Has Frequently Granted Certiorari Solely Because The Issues Are Important Or Of "National Significance" Or Involve Federal Or Constitutional Issues.

two courts below and therefore are inappropriate for certiorari relief. See PMC Brief at 12, 13, and Monsanto Brief at 12, 13. But this misperceives the nature of the questions involved. Because of the summary judgment (*prima facie* case) gloss on the "reasonableness" of the settlement issue, see *Grinnell I*, questions pertaining to the merits of the case must be examined in the light of this Court's holding in such summary judgment cases as *Adickes v. Kress*, 398 US 144 (1970). This Court has frequently granted certiorari in cases involving summary judgment issues. See, e.g., *Adickes and Poller v. C.B.S.*, 368 U.S. 464 (1962). The factual matters concerning the negotiating process, post-settlement procedures and other considerations concerning the reasonableness and fairness of the settlement are undisputed in the record by virtue of the uncontradicted affidavit of the undersigned counsel and others submitted by the objectors. (It must be remembered that Judge Weinstein, in violation of the rule set forth in *In re General Motors*, refused to permit discovery on the settlement issues). In any event, this Court has not hesitated to grant certiorari to resolve factual issues which, as here, are an integral part of overriding legal questions. See, e.g., *NLRB v. Waterman Steamship Corp.*, 300 U.S. 206, 207-209 (1939) and *Furnes Corp. v. Waters*, 438 U.S. 567 (1978) ("We granted certiorari to consider questions raised by this case regarding the exact scope of the *prima facie* case and the nature of the evidence necessary to rebut such a case.")

The cases in which this Court has granted certiorari solely or primarily because the issues are important or of national significance or involve federal or constitutional issues, are legion.¹⁰ And the Court has repeatedly deemed Rule 23 class action litigation important enough to justify the granting of certiorari. See, e.g., *Evans v. Jeff*, 106 S.Ct. at 1536 ("The importance of the question decided"); *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974); and *Phillips Petroleum Co. v. Stutts*, 105 S Ct 2965 (1985).

We do not believe Respondents can really be serious in their contention that this

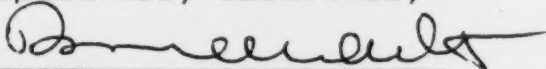
10. See e.g., *U.S. v. Janis*, 428 U.S. 433 (1976) ("Because of the obvious importance of the question, we granted certiorari"); *Nabraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) ("We granted certiorari to address the important issues raised. . ."); *Fitzpatrick v. Bitzer*, 427 U.S. 445 ("We granted certiorari to resolve this important constitutional question"); *Parker v. Flook*, 437 U.S. 584 (1978) ("importance of question"); and *National Broiler Marketing Assn' v. U.S.*, 436 U.S. 816 (1978) ("importance of the issue").

litigation is not sufficiently important to this nation to justify review by our Court of last and highest resort. To contend this, Respondents have to be saying that the Vietnam veterans and their families are not that important; that the issues, relating to defendants who conspired in 1965 to allow the continued contamination of our own fighting military personnel with a chemical they knew contained one of the deadliest toxic compounds known to man, are not that important; that such powerful questions as constitutional due process - the right of individuals not to have their right to their "day in court" stripped from them without their "knowing consent" - are not that important; and that consideration of overriding environmental issues - which completely permeate this litigation - are not that important to our nation as a whole.

The Respondents, Judge Weinstein, and the Court of Appeals speak of a need for a national reconciliation by bringing this

litigation to an end. However, sweeping burdensome litigation under the rug without review by the Highest Court in our land will never provide the reconciliation that is desperately needed and deserved by the Vietnam veterans and their families. The Respondent Chemical Companies knowingly deceived them. Their Government rejected them. They believe their class counsel failed them. The district judge finessed them. The Court of Appeals looked the other way from them. Only a hearing before this Court will finally reconcile them.

Respectfully submitted,



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No. 87-620

Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BARRY KRUPKIN, et al.,

Petitioners,

v.

DOW CHEMICAL CO., et al.,

Respondents.

In re "Agent Orange" Product Liability Litigation

**BRIEF OF AGENT ORANGE PLAINTIFFS' MANAGEMENT
COMMITTEE IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

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PARTIES

Respondents are members of the class who are represented by court-appointed lead counsel to the class, designated in the courts below as the Plaintiffs' Management Committee ("PMC"). As of October 1, 1987, 248,515 individual members of the class have made claims against the settlement fund. To avoid burdening this Court and its staff with the citation of 248,515 names, Mr. George Ewalt, who was one of the named representative plaintiffs in the courts below, has been designated as the named respondent for purposes of Rule 28.1.

This brief filed by the PMC is related to the Krupkin petition only. The various petitions for certiorari arising out of the Agent Orange litigation are unrelated to each other and should be separately considered.

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IN THE
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**BRIEF OF AGENT ORANGE PLAINTIFFS' MANAGEMENT
COMMITTEE IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

PRELIMINARY STATEMENT

This appeal represents the final effort by a single petitioner to undo nine years of complex litigation, involving multiple parties, novel legal claims, and the emotions of thousands of veterans aggrieved by the aftermath of an unpopular war. The cases were tentatively settled on May 7, 1984 for the sum of \$180 million, between the representative plaintiffs and all defendants subject to court approval. A sole petitioner claims that additional benefits

are to be gained by further litigation and delay. Two district court judges and all of the judges of the Second Circuit Court of Appeals have voiced virtually unanimous views concerning various issues raised in the litigation below. Each of those courts applied well-settled legal criteria in rendering exhaustive opinions unanimously approving the class action settlement reached by the parties.

Since petitioner is unable to isolate any particular issue that might warrant the attention of this Court, he urges that certiorari be granted respecting every issue considered by the Court of Appeals in affirming the settlement's approval. Unable to show any error in the Circuit Court's application of well-recognized principles bearing on the single question presented—whether the settlement should be approved—the petition raises multiple assignments of claimed error without setting forth any error in affirming approval of the settlement. The aggregate effect of these multiple claims does not add substance to any one of them.

This case presents no question of constitutional moment, no issue that has generated a split in the circuits, and no facts that indicate that rulings by this Court will assist future courts or litigants. Instead, the petition affirms the PMC's contention that this litigation involves facts that, while emotion-filled from the human and political perspectives, are, from the legal perspective, either unique to themselves or mundane. There is no merit in further delay in the implementation of the settlement reached by the parties as approved and affirmed by the Courts below.

STATUTES AND RULES INVOLVED

Fed. R. Civ. P. 23(b)(3)

RULE 23. Class Actions

* * *

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

28 U.S.C. §1332

§1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 U.S.C.S. §1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 U.S.C.S. §1441], a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

THE CIRCUIT COURT'S RELIANCE ON THE GOVERNMENT CONTRACTOR DEFENSE DOES NOT WARRANT GRANT OF CERTIORARI.

The petitioner suggests that a grant of certiorari is warranted in this case on the "issue" of the government contractor defense because this Court has granted certiorari in *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), *cert. granted* 107 S.Ct. 872 (1987), and has been asked to consider another case, *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985). A review of the disparities among these cases, however, reveals that a grant of certiorari in the instant litigation is neither proper nor necessary.

Both *Boyle* and *Shaw* present this Court with the issue of whether military contractors who do or should have knowledge of product defects not shared by the government are entitled to share the government's immunity from liability for service-related injuries caused by those defects. It is on this factual issue of disparate knowledge and the implication of some courts that contractors must inform the government of alternative products that the Circuit Courts of Appeal may be said to be in conflict. In no case, however, including *Boyle* and *Shaw*, has a Circuit Court of Appeals denied a military contractor immunity where the government possessed knowledge of the alleged hazard equal to that of the contractor. *See, e.g., McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), *Koutsoubos v. Boeing Vertol, Division of Boeing Co.*, 755 F.2d 352 (3rd Cir.),

cert. denied, 106 S.Ct. 72 (1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985). The Agent Orange litigation, like those cases, presents an instance of equal knowledge.

The Second Circuit understood that "the information possessed by the government at pertinent times was as great as, or greater than, that possessed by the chemical companies." 818 F.2d at 190, and *see*, 818 F.2d at 174. That same finding was made by the District Court in approving the settlement, 611 F. Supp. at 1263, and is not challenged here. The Second Circuit had no doubt that the government possessed relevant information necessary to permit a meaningful comparison of risks and benefits of the product, i.e., the comparison that forms the basis of *all* formulations of the defense. *See* 818 F.2d at 193.

Petitioner's suggested parade of horrors emerging from the Second Circuit's formulation of the defense in this case is simply fictitious. The Court of Appeals made no holding as to a proper formulation of the defense. It determined that under *any* proper formulation, the defense posed a substantial risk to the plaintiffs. Implicit in the Second Circuit's rationale is the well-accepted view that government contractors will be liable if they possess greater material information than the government relevant to a decision to employ a specific product. Thus, the Second Circuit, in common with all other circuits, recognizes appropriate incentives for contractors to ensure that the government has equal relevant knowledge with respect to potential hazards.

The only thing the Second Circuit has decided in this litigation is that any applicable test would have been satisfied considering the evidence presented in this litigation. The purported issue as to whether a contractor may be liable for failure to inform the government of hazards of which the government may be ignorant or of alternative products about which the contractor did or should have

known (the questions presented by *Boyle* and *Shaw*) is simply not implicated in this case.

While the Second Circuit's opinion affirming approval of the settlement discussed the role that the government contractors defense played in the litigation, its discussion does not constitute a holding as to any particular element or facet of the defense. It merely holds that the defense, however properly formulated, was likely to work a potential dismissal of all of the plaintiffs' claims and, therefore, became a significant factor in the Court's determination that the approval of the settlement by the District Court was appropriate.

It is ironic that petitioner attempts to achieve a grant of certiorari on this alleged issue, since the Second Circuit found that the petitioners "inexplicably and unjustifiably" failed to address adequately the issue they now deem so crucial. 818 F.2d at 173, referring to 818 F.2d at 187-190. Granting a writ of certiorari in these circumstances would be in direct contravention of this Court's general policy that issues not properly presented in lower courts cannot be raised at the final level of appeal.

Finally, the only issue which could properly be before this Court would be the Second Circuit's affirmation of the settlement. It affirmed the District Court's approval thereof in light of the *many* significant obstacles the plaintiffs had to *any* recovery. This included the possibility that the defendants would have successfully pleaded and proven the government contractor defense. The issue, then, is *not* whether that defense was fully established, but whether—if the case had proceeded to trial—it may have been established. The District Court determined that defendants would have been entitled to summary judgment. One can hardly conclude that such a case did not warrant settlement by plaintiffs.

A redetermination by this Court in 1987 or 1988 of the appropriate elements of the government contractor defense does not bear on whether the plaintiffs had good cause for concern in 1984 that the law prevailing at that time would bar recovery. The defense gave plaintiffs good cause for concern; it was a substantial factor militating in favor of settling the litigation. There is nothing, therefore, contained in the Circuit Court opinion affirming the settlement which merits Supreme Court review.

II.

NO IMPORTANT QUESTION OF FEDERAL LAW OR POLICY IS AT STAKE WARRANTING FURTHER JUDICIAL REVIEW; THE AGENT ORANGE LITIGATION IS *SUI GENERIS* AND OF LITTLE PRECEDENTIAL VALUE.

This Court should not grant certiorari in this litigation, in part because the plaintiffs' claims do not arise under the constitution, any specified federal statute, or under federal common law. In an earlier phase of this proceeding the Second Circuit decided that there is no identifiable federal policy at stake in this litigation. 635 F.2d 98 (2d Cir. 1980).

The Solicitor General of the United States agreed with the Second Circuit in its brief for the United States as *amicus curiae* in November 1981. The Supreme Court denied certiorari. 454 U.S. 1128 (1981).

As a consequence of the Second Circuit's decision, the class action thereafter proceeded in the District Court solely on the basis of diversity jurisdiction under 28 U.S.C. §1332. It constituted essentially an action between private parties for personal injury sounding in tort. The disposition of plaintiffs' claims through settlement of the litigation carries little, if any, weight in terms of the constitution, federal statutes, federal common law, or even federal policy.

Certiorari is also inappropriate because the litigation actually has little, if any, precedential value. The Agent Orange cases arose out of the conduct of the Vietnam war. They involve a cauldron of factual issues relating to military action, political controversy, scientific and medical matters, each of great complexity, controversy, and uncertainty. No other pending or prior litigation anywhere in the country comes to mind which deals with the factual scenario underlying the Agent Orange controversy.

With considerable understatement, the Second Circuit characterized the Agent Orange litigation as “an extraordinary piece of litigation” (818 F.2d at 148), whose “most noticeable fact is the pervasive factual and legal doubt that surrounds the plaintiffs’ claims” (818 F.2d at 149). Issues creating such doubt included problems of liability, causation, choice of law, statutes of limitations, the government contractor defense, indeterminate plaintiffs and defendants, and problems inherent in nation-wide class action management. 818 F.2d at 172-74.

This unique combination of wartime genesis and factual complexity makes the litigation *sui generis*. There never was a case like Agent Orange; it is unlikely to occur again. Its facts are so unusual as to negate any precedential value in other litigation. In fact, the Second Circuit has directly restricted its precedential value by emphasizing its uniqueness and pointing out the novelty of the District Court’s pretrial rulings in some areas. It expressed sufficient skepticism as to the acceptability by other courts of the District Court’s view on choice of law to sharply restrict its precedential weight. 818 F.2d at 173.

Fortunately, the litigation was settled, mooted all of the disputed issues of law and fact which were in contention prior to the settlement.

The Court of Appeals' decision does not establish precedent for opening the floodgates of class action litigation in any type of mass tort cases. The Court commented on the individuality of the causation issue (818 F.2d at 165). It agreed with the prevalent skepticism over the usefulness of class actions in other tort litigations, and it allowed class certification in this case only because of its finding that the military contractors defense raised common questions central to all claims under F.R.C.P. Rule 23(b)(3). (818 F.2d at 150, 164-67).

The Second Circuit recognized that the Agent Orange case and its settlement were largely the result of coincidental nonrecurrent factors when it stated,

The weakness of the evidence of causation as to all plaintiffs and the strength of the military contractor defense enabled the district court to evaluate the settlement accurately and to fashion an appropriate distribution scheme in the instant matter. We regard those factors as largely coincidental and not to be expected in all toxic exposure cases. 818 F.2d at 166.

Since this litigation has little precedential value, a grant of certiorari would be unnecessary and improper.

III.

THE SUPREME COURT HAS CONSISTENTLY DENIED CERTIORARI IN THE AGENT ORANGE LITIGATION AND OTHER ANALOGOUS CLASS ACTIONS.

Issues fundamentally identical to those urged by petitioner here have been raised in prior Agent Orange proceedings. Following class certification (100 F.R.D. 718, E.D.N.Y., 1980), the defendants asked the Second Circuit to issue a writ of mandamus to vacate the certification. In denying the petition, the Court of Appeals stated "it seems likely that some common issues which stem from

the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial." *In Re: Diamond Shamrock Chemicals Company*, 725 F.2d 858, 860-61 (2d Cir. 1984). The Second Circuit also observed that the class notice ordered by the District Court was arguably the best practicable under the circumstances. It further indicated that the propriety of a class certification might be fully reviewed by it on a later appeal (725 F.2d at 862).

On petition filed by the defendants, the Supreme Court denied certiorari, 465 U.S. 1067 (1984), suggesting that the Court found it inappropriate to intervene in the mechanical aspects of the Agent Orange litigation.

The full review alluded to by the Second Circuit was in fact made in 818 F.2d at 146 on the appeal from Chief Judge Weinstein's orders (100 F.R.D. 718 and 597 F. Supp. 740) certifying the plaintiff class and approving the settlement. After carefully reviewing the exhaustive opinions of the District Court, the Court of Appeals again concluded that class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense (818 F.2d at 166). It also concluded that the District Court's notice plan was fully adequate under the circumstances (818 F.2d at 169). Relying on Supreme Court precedents, the Second Circuit based its conclusions on the facts that:

- a. Rule 23 accords considerable discretion to a district court in fashioning notice to a class, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); and
- b. The standard of appellate review is whether the district court was clearly erroneous in its factual findings and whether it abused its traditional discretion. *Albermarle Paper Company v. Moody*, 422 U.S. 405 (1975).

The Second Circuit properly noted it to be inappropriate to second-guess a district court's class notice procedure, "particularly [where] no alternative method of ascertaining class members' identities has been suggested to us," citing *Weinberger v. Kendrick*, 698 F.2d 61, 71 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), a case supporting the view that this Court should not "second-guess" both the District Court and the Second Circuit by reviewing the adequacy of the notice plan adopted by Chief Judge Weinstein, which the Court of Appeals described as "appropriate to this unique case" (818 F.2d at 167).

In the present context of this litigation, settled and fully approved by both the District and Second Circuit courts, there is less reason to review the District Court's management of the action and its settlement.

The Supreme Court's practice is to decline taking cases to review factual issues where the findings of fact made by the district court receive the concurrence of the Court of Appeals. In those situations the Court has often held that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949) (and cases cited therein), *reh. gtd. on other grounds*, 339 U.S. 605 (1950); *Berenyi v. Immigration Service*, 385 U.S. 630, 635 (1967).

Settled Supreme Court practice operates against review of the adequacy of post-settlement procedures conducted by Judge Weinstein. When asked to review aspects of class action settlements, the Court has consistently denied certiorari. For example, in *In Re: Corrugated Container Antitrust Litigation*, 643 F.2d 195, 223-24 (5th Cir. 1981),

cert. denied, 456 U.S. 998 (1982), the Court held that there is no absolute requirement that a distribution plan be formulated prior to notification of a class of settlement. It has also been held that a court "should not turn a settlement hearing 'into a trial or rehearsal of the trial,' " *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976).

Even allegations of collusion in the negotiation processes culminating in class action settlements have failed to persuade the Supreme Court to grant certiorari. *Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), *cert. denied*, 459 U.S. 878 (1982).

The only standard set out in Rule 23 regarding approval of class action settlements is, under applicable authorities, that settlements generally should be fair, reasonable and adequate. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971). There is no reason for the Supreme Court to substitute its own factual standards for those the lower courts have established for judging what is fair, reasonable, and adequate. The trial court has before it direct knowledge of all of the facts, circumstances, and contentions of the parties and is, therefore, obviously in the best position to determine the overall fairness of such settlements. This is one reason why the standard of appellate review in the Court of Appeals eliminates second guessing, and relies upon the traditional abuse of discretion standard.

Since the *Krupkin* petition merely contains a rehash of arguments made in the Second Circuit, its request for a grant of certiorari is that the Supreme Court substitute its own judgment for that of the trial court on factual issues, traditionally an improper subject matter of Supreme

Court review. *See, e.g., Fields v. United States*, 205 U.S. 292 (1907); *United States v. Johnston*, 268 U.S. 220 (1925), and *N.L.R.B. v. Waterman SS Corp.*, 309 U.S. 206, *reh. denied*, 309 U.S. 696 (1940).

Denial of certiorari in this litigation is prudent because fairness, reasonableness, and adequacy must be judged in light of the "totality of the circumstances." *Grunin v. International House of Pancakes*, 513 F.2d 114, 124 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975). The "totality of the circumstances" in this litigation, as in other class action settlements, is best judged by the district court which was closest to the litigation. This is particularly true where, as here, the extensive opinions of the District Court were meticulously reviewed under proper standards and affirmed by the Second Circuit.

IV.

THE SETTLEMENT IS IN ALL RESPECTS FAIR, REASONABLE, AND ADEQUATE; GRANTING A WRIT OF CERTIORARI WOULD IRREPARABLY INJURE VETERANS AND THEIR FAMILIES.

In its simplest form, the petition contends that the settlement constitutes less money than a single objector feels should be paid to the veterans. Somehow, in the opinion of the petitioner *only*, further litigation would lead to more money.¹

¹ This situation is similar to circumstances apparent in the petition in *Pinkney, et al. v. Dow Chemical Company, et al.*, No. 87-437. In the PMC's response to Mr. Pinkney's petition, defects are noted. The same arguments therein apply to Mr. Krupkin as well as his counsel, Mr. Musslewhite. Like Mr. Pinkney's counsel (Ashcraft & Gerel), Mr. Musslewhite urged class certification and sup-

(Footnote continued on following page)

Much of the petition is directed at disagreements with the District Court and Court of Appeals regarding the facts of the case. No substantial disagreement is raised with the Courts' use of proper standards and criteria for determining propriety of the settlement. Mr. Krupkin's expounded wish is for a trial rather than settlement. He concedes, however, that if the case is settled, he simply wants more money for the class. This result is unachievable.

While couched in terms of what the "veterans wish to see" in this, their litigation, throughout the course of these proceedings there has not been identified one veteran who has either properly opposed class certification or the concept of settlement. At this point, only two objectors, Krupkin and Pinkney, both arguably without standing, and neither objecting in the court below, have taken it upon themselves to risk the only actual substantial benefit achieved through any device for Vietnam veterans who claim to be affected by the Agent Orange herbicides. Neither objector seems to acknowledge the PMC's overriding responsibility to the class as a whole. That responsibility was to weigh *all* factors present in the litigation

¹ *continued*

ported the notice given by the trial court at all times prior to the settlement. Mr. Musslewhite was a member of the PMC who spoke wholly in favor of the tentative settlement (which he agreed to) throughout the process of the fairness hearings. It was only after Chief Judge Weinstein entered his order respecting class counsel fees that Mr. Musslewhite resigned from the PMC and then began to contest the settlement. The PMC has further noted the question as to the petitioner's standing. More importantly, veterans who objected in the court below to class certification had the opportunity to opt out (and did so). These claims are not properly raised by the petitioner. The petition is not brought by any veteran who has indicated he has been harmed in any way. Implicit in the petition is the underlying fact that it is brought by lawyers who seek self-reward.

in determining whether to forge forward through a trial of the case or to tentatively accept the settlement offered by the defendants.

The approval of the District Court confirms that all factors present in the litigation militated in favor of the settlement. Chief Judge Weinstein emphasized in part the difficulties all the plaintiffs faced in proving the necessary element of medical causation. The Court of Appeals, acknowledging that, and also taking into account all factors in the litigation, chose to emphasize the difficulties the plaintiffs faced with the government contractors defense and the pervasive factual and legal doubt surrounding plaintiffs' claims. Both Courts, however, were in full agreement that all factors weighed in favor of the benefits conferred by the settlement as opposed to the risks of continuing the trial effort. The risk of ultimate loss by reason of one or more of these factors constitutes a large part of the equation. Another factor was the prospect of years of continued legal effort with no certainty of any recovery. All factors were substantial considerations in the PMC's exercise of its best judgment in deciding to settle.

The veterans who will benefit by the settlement are in desperate need of monetary aid now. This is not a class action such as some commercial cases involving numerous claimants waiting for a small amount of money in refund for a commercial transaction. To the contrary, these veterans need direct medical aid and indirect aid to help them take advantage of benefits available from other sources, including veterans' programs, which thus far have been denied them.

The petitioner belittles the amount of the settlement. He fails to note that the principal on deposit in the fund, at the average rate of interest being earned, leads to income in excess of \$1,150,000.00 per month. The fund con-

fers life-improving benefits upon large numbers of the class. These are benefits available to them from no other source. They were achieved through hard lawyering in a litigation that resulted in a concrete settlement that is ripe for distribution. The *Krupkin* petition reveals no more than wishful speculation on the part of petitioner and his counsel. Petitioner has not suggested any workable, practical alternative to the settlement. His wish for a trial is likely to result in a complete loss of any benefit to the class. The petitioner's request, if granted, would ensure years of continued litigation, years of continued burden on the part of all parties concerned, years of a lack of financial and other aid to the veterans, more frustration, a continued high level of emotionalism, and an increased lack of ability on the part of the veteran population to integrate the balance of their lives into society.

The PMC has never contended that the settlement of this litigation is the cure for the veterans' ills. The Judges below have all agreed with the PMC's exercise of responsibility and best judgment that the settlement is a fair, reasonable, and adequate resolution, not of all of the problems of the Vietnam veterans, but of the litigation.

The Agent Orange settlement has grown with the accrual of interest to nearly \$230,000,000.00. No other fund of any consequence is available to compensate the veterans for their suffering. The United States Government has denied that their injuries and diseases are service connected or caused by exposure to Agent Orange. Hence, with few exceptions, it has stubbornly rejected their claims for benefits.

The Second Circuit summed up its approval of the adequacy of the settlement in these words:

Within the sharply limited judicial role we must ask whether the settlement of the litigation proposed by the parties' representatives is acceptable. For the reasons indicated below we tentatively hold that it is. It gives the class more than it would likely achieve by attempting to litigate to the death. It provides funds to help at least some men, women and children whose hardships will be reduced in some small degree. It does represent a major step in the essential process of reconciliation among ourselves. (818 F.2d 145).

But the settlement does considerably more than that. The distribution plan spells out the benefits to the veterans (see 597 F. Supp. at 858-61 and 611 F. Supp. 1396). It provides veterans with the opportunity to establish effective means of representing their interests. The district court recognized "the settlement provides a powerful legal, medical, political, and social instrument" (597 F. Supp. at 858).

CONCLUSION

Since 1979, the Agent Orange litigation has been a nationwide lightning rod generating interest and emotional controversy. It has also generated despair and has imposed a vast burden upon the resources of the federal judiciary. The PMC believes that it is and has been time to end the legal controversy. It should be removed from the legal shackles the courts necessarily impose. It is time to begin channeling the fund to the veterans. They can then constructively begin addressing their present and future needs. A denial of certiorari is the final step in ensuring the beginning of that positive process.

The District Court observed, and the Second Circuit agreed, "the plaintiffs were also seeking larger remedies and emotional compensation that were beyond its power to award" (597 F. Supp. at 747; 818 F.2d at 148). It is a tribute to both of the lower Courts that they have wisely approved the settlement of plaintiffs' claims in view of the denial by the executive and legislative branches of our government. The judicial branch has permitted the fashioning of a settlement which affords the veterans at least some of the tools with which to work toward better lives, larger remedies, and the emotional compensation they desperately desire. For the Supreme Court to interfere with and delay this process of reconciliation, particularly upon the grounds asserted in the petition, would lead to the reopening of old wounds upon no proper legal ground. There is no valid reason for this Court to allow such delay.

The Agent Orange controversy is a classic instance of a litigation which should not be the subject matter of a grant of certiorari. It is a once in a nation's lifetime case. Some of our finest judicial talent has exhaustively reviewed all of its circumstances. Because of its uniqueness it has no serious potential for establishing any judicial precedent. It is the type of case which this Court has consistently found undeserving of certiorari. The legal issues on which certiorari is sought were previously properly denied in earlier phases of the litigation.

Finally, a grant of certiorari is likely to irreparably injure the veterans who have already suffered from events which began in the 1960s and which have been relived during the long years of this litigation. There is no preferred alternative to the settlement. To deny certiorari is legally proper, practically effectuating the disbursement of life-improving benefits to class members, and morally correct.

We respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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